Chemical Solvents, Inc. and Turn-To Transport, LLC, a single employer and/or alter egos *and* Teamsters Local Union 507, a/w International Brotherhood of Teamsters. Cases 08–CA–039218, 08–CA–039277, 08–CA–039300, 08–CA–039335, 08–CA–039362, 08–CA–039412, and 08–CA–061979

August 24, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On May 15, 2012, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and corresponding answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] except as modified in this Decision and Order, to amend his remedy, and to adopt his recommended Order as modified and set forth in full below.[3]

Chemical Solvents, Inc. (the Respondent or CSI) has operated as a handler, producer, and distributor of chemicals for over 40 years. For most of that time, it employed truckdrivers to deliver its products to customers and to haul used containers and waste back to its facility in Cleveland, Ohio. Ed Pavlish is the sole owner and president of CSI; his wife, Pat Pavlish, is CSI's secretary/treasurer. The Union has represented the Respondent's production and maintenance employees and truckdrivers in a single bargaining unit since 1997.

The issues raised in this case primarily relate to circumstances surrounding CSI's decision to subcontract its trucking operations and the subsequent implementation of that decision. In January 2011, while a collective-bargaining agreement was in effect, CSI advised the Union that it had decided to phase out its trucking operation, lay off the drivers, and thereafter use subcontractors for its driving work. Over the course of 2011, it replaced all of its bargaining unit drivers with subcontracted drivers. In late May 2011, Pat Pavlish established a new corporate entity, Turn-To Transport, LLC. By late July, Turn-To Transport had purchased all of CSI's trucking equipment, including trucks, trailers, and tankers. The amended consolidated complaint alleges that CSI, as an integrated entity with Turn-To Transport, committed a series of violations of Section 8(a)(5), (3), and (1) of the Act. The judge found merit in some of the complaint's allegations and dismissed others. Except as discussed below, we affirm the judge's findings for the reasons he stated.

As discussed below, we agree with the judge that the Respondent's decision to subcontract the trucking work was not unlawful. We disagree, however, with the judge's resolution of four specific issues. First, we find that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally changing bargaining unit employees' health insurance benefits in the summer of 2010 without giving the Union adequate notice and opportunity to bargain about the change. Second, we find that the Respondent violated Section 8(a)(5) and (1) in the fall of 2010[4] by unilaterally changing its discipline policies regarding cell phone usage and vehicle inspections. Third, we find that the Respondent violated Section 8(a)(5) and (1) by failing to furnish certain information, requested by the Union in mid- to late January 2011, that related to the Respondent's motive for deciding to subcontract the driving work as well as to the Un-

[1] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We adopt the judge's finding, to which there are no exceptions, that as a consequence of unlawfully refusing to furnish information requested by the Union that related to the effects of the decision to subcontract, the Respondent failed to give sufficient notice and opportunity to bargain about the effects of the decision, in violation of Sec. 8(a)(5) and (1). We find it unnecessary to rely on the judge's related discussion regarding whether the Respondent's actions would have met its obligation to engage in effects bargaining had it timely furnished the information. We also adopt the findings, to which there are no exceptions, that the Respondent violated: Sec. 8(a)(1) by threatening an employee with unspecified reprisals and by soliciting employees to resign and offering them money to resign, because of protected concerted activity; Sec. 8(a)(3) and (1) by issuing a verbal warning to an employee in retaliation for union activity; and Sec. 8(a)(5) and (1) by unilaterally installing and operating surveillance cameras. No exceptions were filed to the judge's dismissal of several additional unlawful threat allegations.

[3] We shall modify the judge's recommended Order to conform to the violations found, the Board's standard remedial language, and our amended remedy, which includes the Board's traditional remedy for the failure to bargain about the effects of a decision to eliminate bargaining unit jobs. *Transmarine Navigation Corp.,* 170 NLRB 389 (1968). See *Sawyer of Napa*, 321 NLRB 1120 (1996) (applying *Transmarine* remedy where job loss resulted from cessation of one of the employer's operations). We shall substitute a new notice to conform to the Order as modified and in accordance with our decision *in Durham School Services*, 360 NLRB No. 85 (2014).

[4] Dates are in 2010, unless otherwise indicated.

ion's pending grievance. Finally, contrary to the judge, we find that Turn-To Transport and CSI are jointly liable for the violations found because the evidence fully establishes that they are a single employer.

A. Alleged 8(a)(5) Unilateral Changes in Health Benefits

Under the terms of the parties' 2007–2012 collective-bargaining agreement, unit employees received the same health insurance benefits as other employees covered by the Respondent's health care plan. The contract provided that, during its term, the Respondent would pay any yearly increase in premiums up to 7 percent, and employees would pay up to 3 percent. The agreement further provided that

> The Company has the right to obtain comparable insurance during the term of this Agreement, but if comparable coverage cannot be obtained that does not exceed the yearly caps (7% for the Employer and 3% for the Employee), then both the Company and the Union will reopen negotiations on Health Insurance Coverage.

At some point in early 2010, the then-current insurer, Kaiser, informed the Respondent that to continue existing benefits, there would be a 23-percent increase in premiums; the alternative would be a 10-percent premium increase with reduced coverage. The Respondent engaged a consultant who attempted for about a month to find more attractive terms, but without success. Accordingly, on July 14, the Respondent's attorney, Thomas Colaluca, informed Union Secretary-Treasurer Albert Mixon that the current health coverage would expire on August 1; that Kaiser had stated that it would renew coverage only with a premium increase of more than 20 percent; and that the Respondent had tried but failed to find comparable coverage at no more than a 10-percent increase in premiums. Pursuant to the quoted contract provisions, Colaluca offered to meet and discuss alternatives with the Union. On July 16, Colaluca emailed Mixon, informing him that maintaining the current coverage would involve a 23-percent premium increase. In the alternative, Colaluca proposed two options, each with reduced benefits and with an 8.9-percent increase in premiums, of which the Respondent would pay 70 percent and employees, 30 percent. Under the first option, dental coverage would be eliminated; under the second, dental coverage would be retained, but employees would pay the full premium. Under either option, employees would have increased deductibles and copays.

Because of a previous engagement, the Union's negotiators were unable to meet until July 29. In the meantime, on July 23, the Respondent posted a memo to employees (with explanatory attachments) advising them that maintaining current coverage would entail a 23-percent premium increase; that other carriers were more expensive; and that the Respondent was staying with Kaiser, with reduced coverage, and with the Respondent paying 7 percent of the increased premiums and employees paying 3 percent. There would be no dental coverage under the Kaiser plan, but employees could obtain coverage from a different carrier. The Respondent posted a second memo, with the same attachments, on July 28. Both memos informed employees that they needed to sign up for the new coverage by July 30.

The parties met to discuss the health insurance issue on July 29, August 5, and August 10. As the judge described in greater detail, Mixon protested the proposed changes. Colaluca responded that it would cost an additional $30,000 to maintain the existing coverage, which would have to be split 50-50 between the Respondent and employees; Mixon rejected that suggestion. Colaluca invited the Union to present any ideas it might have for resolving the problem. Mixon presented figures representing premiums for coverage under the Bakers and Teamsters plan, but Colaluca pointed out that the premiums under that plan were higher than under the Respondent's proposal. Mixon also suggested that the existing coverage be retained, with the Respondent absorbing the entire increase in cost; Colaluca declined. The Union made no further proposals.

At the July 29 meeting, Colaluca warned that Kaiser would terminate coverage on August 1 if the Respondent did not agree to the carrier's proposed increases. However, at some point the Respondent obtained an extension of the deadline to September 1, and so advised the Union.[5] Also, on August 1, Colaluca advised Mixon by email that the Respondent could opt out of the current plan on 30 days' notice if comparable coverage could be found at the contractual rate. The parties did not reach agreement, and on September 1 the Respondent implemented its proposed plan, except that it paid the entire 8.9-percent premium increase.

The judge found that the Respondent violated Section 8(a)(5) by implementing the revised coverage without affording the Union sufficient notice and opportunity to bargain over the proposed changes. Erroneously believing that the Respondent had known about Kaiser's announced premium increases by March 15, 2010,[6] the

[5] The record does not clearly indicate exactly when the Respondent informed the Union about the deadline extension, but it appears that it was sometime before August 5.

[6] The judge inadvertently relied on a letter from the Respondent's insurance consultant dated March 15, 2011. In fact, the record does not

judge found that the Respondent had delayed, without explanation, for some 4 months before informing the Union of the need to meet and discuss alternative coverage. That notice was given just over 2 weeks before the current coverage was to expire, which the judge found was insufficient notice to allow for meaningful bargaining. Accordingly, the judge agreed with the General Counsel that the Respondent had presented the Union with a fait accompli. As explained below, we find that the record does not support this conclusion.

The General Counsel chiefly argues that the Respondent gave the Union insufficient notice before implementing the changes in health coverage.[7] He points out, correctly, that the Respondent's consultant had been researching possible alternative coverage for a month before July 14, yet the Respondent failed to notify the Union of the situation until that date, just over 2 weeks before the August 1 deadline. In the General Counsel's view, that was too short a period of time for the Union to adequately consider and suggest alternatives to the Respondent's proposed changes in coverage, which were substantial. The judge agreed.

And so would we, if the Respondent had actually put the revised plan in place on August 1, as was originally envisioned. But as the judge found, the Respondent persuaded Kaiser to extend the August 1 deadline until September 1, and that was when the new coverage actually went into effect. There are no exceptions to that finding. Accordingly, the Union had almost 7 weeks to attempt to come up with alternative proposals, which is an amount of time sufficient to defeat the General Counsel's allegation of fait accompli in the circumstances of this case.[8]

Moreover, the record strongly indicates that meaningful bargaining did take place. Both parties made proposals and suggested alternatives, although they never reached agreement. As an alternative to the Respondent's initial proposal, Colaluca suggested that existing benefits could be retained if the Respondent and the employees each paid half of the increased cost, but Mixon rejected that idea. Colaluca also asked the Union for proposals to try to solve the problem. The Union suggested obtaining coverage under the Bakers and Teamsters plan, but presented only a list of premium levels, which proved to be higher than those the Respondent had offered. Mixon's only other suggestion was to retain existing coverage and for the Respondent to pay the entire cost increase; predictably, Colaluca rejected that option (which was obviously not contemplated in the parties' collective-bargaining agreement). The Union made no further proposals after August 10, even at the parties' next meeting, on November 1.[9]

The General Counsel also contends that the Respondent's action was a fait accompli because it intended all along to act unilaterally. In support, the General Counsel points to the Respondent's having waited for at least a month before notifying the Union that something had to be done, in a little more than 2 weeks, to address the health insurance problem. The General Counsel also cites the Respondent's notifying employees to sign up for the new coverage by July 28, before the parties would have a chance to meet for negotiations. We find neither argument persuasive.

While the Respondent's decision to wait a month to notify the Union of the insurance issue was quite arguably ill advised, and, as previously stated, we would have found a violation if the existing coverage had not been extended, the coverage was in fact extended, at the Respondent's request. We also note that during this period, the Respondent's consultant was actively searching for a more attractive alternative to Kaiser's announced premium changes, and that had the consultant found coverage comparable to that which the unit employees were then enjoying, at no more than a 10-percent premium increase, the Respondent would have been contractually entitled to implement that coverage without bargaining.[10] It cannot reasonably be inferred that the Respondent always intended to impose unilaterally the coverage it ultimately proposed, when, consistent with the parties' contractual understanding, it was searching for a better alternative.

indicate when the Respondent received notice of the impending premium increases.

[7] The General Counsel did not argue that the Respondent failed to meet its obligation under the contractual reopener clause to bargain to consent or impasse. See *New Seasons, Inc.*, 346 NLRB 610 (2006); *Speedrack, Inc.*, 293 NLRB 1054 (1989). Accordingly, we do not address that issue.

[8] In his answering brief, the General Counsel notes that in 2008, Colaluca informed Mixon nearly 2 months before the policy renewal date that the health insurance carrier had announced an increase that was outside the contract terms. As a result, "the matter was resolved in a timely manner because the parties had adequate time to meet and bargain." The time actually available to the parties for bargaining in 2010 was almost as long as in 2008.

[9] Around August 23, Colaluca sent Mixon a letter offering to meet and continue discussions during the ensuing 2 weeks; there is no record of a response. A meeting scheduled for September 24 or 25 was canceled when not all members of the Union's negotiating committee showed up.

[10] The General Counsel characterizes the Respondent's action as "looking for a way to unilaterally impose a new plan by keeping the increase to less than the contractually mandated 10% increase." A more apt description might be "attempting to find comparable coverage at a less than 10 percent cost increase, as the parties had expressly contemplated in their collective-bargaining agreement."

Nor do we find it significant that on July 23 and 28, the Respondent informed employees that they needed to sign up for the new coverage by July 30. At the time the Respondent made those announcements, it believed that the new coverage had to take effect by August 1. It had also been informed that the Union could not commence negotiations over alternative health coverage before July 29. Waiting for negotiations to begin before advising employees to enroll would have risked employees' losing coverage entirely, at least for some period. In these circumstances, we view the Respondent's notices as an effort to avoid any such outcome, not as evidence that the Respondent was simply going through the motions of bargaining.[11]

For the foregoing reasons, we reverse the judge and find that the Respondent did not present the Union with a fait accompli when it announced its proposal for alternative health coverage on July 14. We will therefore dismiss this complaint allegation.

B. The 8(a)(5) Unilateral Changes in Work Rules

In late October, drivers James Griffith and Bill Zemaitis were called individually to Vice President of Operations Gerald Schill's office for training with Schill and Traffic Manager John Jones. Griffith and Zemaitis were both shown cell phone records and told that they were abusing the Company's cell phone policy by talking on the phone too much and by using the phones for nonwork purposes. Schill told them that for safety reasons they were not to use the phones while driving. Schill also told them that the drivers' pretrip truck inspections should take no more than 30 minutes, and that if they took longer, the drivers were to call the office or submit a written report. Importantly, Schill admitted telling them that future violations of either the cell phone or pretrip inspection rules would result in discipline.

The judge dismissed the complaint allegation that the Respondent had unlawfully implemented cell phone and pretrip inspection rules, finding that the General Counsel failed to establish that the rules at issue constituted "material, substantial, and significant" changes in terms and conditions of employment. See, e.g., *Crittenton Hospital*, 342 NLRB 686, 686 (2004). Regarding the cell phone policy, the judge considered that the Respondent posted a memo dated September 2 describing the policy before the trainings were held, and that the rule as presented to employees in the training was consistent with that memo. Finding the testimony of Griffith, the only witness to testify about the cell phone policy prior to September 2, to be "confusing," and noting that no grievances had been filed specifically about the September 2 memo, the judge determined that there was no clear evidence in the record to establish what the cell phone policy was before September 2. He therefore found that the General Counsel had not established that the policy had changed.

Contrary to the judge, we are persuaded that both the text of the September 2 memo and the circumstances of its distribution to employees establish that the Respondent's restriction on cell phone usage constituted a material, substantial, and significant change in working conditions. The September 2 memo is addressed to All Drivers from John Jones, Traffic Manager, and the subject is: COMPANY POLICY—USE OF CELL PHONES. Significantly, it states in full:

> EFFECTIVE IMMEDIATELY—DRIVERS ARE NOT TO TALK, TEXT OR ANSWER CELL PHONES WHILE DRIVING.
>
> IF YOU NEED TO MAKE A PHONE CALL OR TO ANSWER YOUR CELL PHONE, YOU NEED TO PULL OFF THE ROADWAY AT A SAFE PLACE OR AT YOUR DESIGNATED STOPS.

We infer from the text of this memo, and particularly from the "EFFECTIVE IMMEDIATELY" reference, that the cell phone use restriction was a new rule. The Respondent's distribution of the memo to all drivers and its holding of individual training sessions apprising employees of the rule contributes to our finding that it was a new rule. Moreover, in early October, the Respondent monitored drivers' use of cell phones for the first time using a computer system that it had acquired a year earlier, which it used to identify drivers abusing the policy. This new emphasis on identification of abusers further suggests new rules. The attachment of discipline to the new cell phone usage rules strengthens our finding that this change was significant, material, and substantial. See *Salem Hospital Corp.*, 360 NLRB No. 95, slip op. at 3 (2014); *Toledo Blade, Co.*, 343 NLRB 385, 387 (2004). We find that the absence of clear evidence of a prior cell phone usage policy does not preclude a finding that the policy announced in the September 2 memo and discussed in the October trainings was a unilateral material, significant, and substantial change in this case. As discussed, the evidence adduced by the General Counsel was sufficient to warrant the inference that there was such a change in the policy and its enforcement. If evidence existed to counter or rebut the General Counsel's showing regarding the Respondent's policy, the Respondent was in an

[11] There is no contention that these announcements constituted direct dealing.

ideal position to produce and present it. It failed to do so. Cf. *Ferguson Enterprises, Inc.*, 349 NLRB 617, 618 (2007) (newly implemented truck key policy constituted material change, where employee disciplined for taking key home in violation of new policy; no evidence that any employee was disciplined for taking keys home previously).

Similarly, the attachment of discipline to the pretrip inspection reporting requirement leads us to conclude the rule was a material, substantial, and significant change in working conditions. The judge found that although the pretrip inspection rule reflected a change, it was not a material change, because complying with it did not impose a substantial burden on employees. The judge cited *El Paso Electric Co.*, 355 NLRB 544, 553–554 (2010), in which the Board adopted a judge's finding that requiring employees to call in if they were unable to finish a job did not rise to a "material, substantial, and significant change," where there was no inconvenience to employees. In *El Paso*, however, there was no showing that discipline was attached to the new rule. As with the cell phone usage rule, the potential for discipline for failing to adhere to the new pretrip inspection rule convinces us that the Respondent's failure to give the Union prior notice and an opportunity to bargain about the changes violated Section 8(a)(5) and (1).

C. CSI's Decision to Subcontract its Trucking Operations

Until late 2010, the trucking of chemicals and chemical waste products for the Respondent's customers was done mainly by the Respondent's bargaining unit drivers. There were some exceptions. Subcontractors were used to carry "freight" waste because the Respondent had decided not to purchase the equipment needed for such work. Outside carriers were also sometimes used for jobs outside of the drivers' normal geographic area, when there was more work than the Respondent's drivers could handle, if a customer requested a particular carrier, or for less-than-truckload deliveries. But before November 2010, the only time an outside carrier was used on a recurring basis was in November 2009, when All Pro drivers handled three deliveries.

The situation began to change in November 2010. Beginning on November 5, and regularly thereafter, All Pro and, within a couple of months, CETCO and DistTech drivers handled increasing amounts of work for the Respondent. Unit drivers, in their turn, filed 11 grievances contending that the Respondent had violated the collective-bargaining agreement by outsourcing work when unit drivers had not been given the 40 hours per week required under the contract.

Beginning on February 4, 2011, the Respondent informed the Union that it was laying off three unit drivers. Other layoffs followed. The Respondent offered the drivers alternative bargaining unit positions as entry-level material handlers, but at lower pay levels. None of the nine drivers accepted the offers; one retired, three resigned, and five were laid off. All of the Respondent's trucking operations are now performed by subcontractors.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by unilaterally subcontracting bargaining unit work and laying off unit drivers without giving the Union prior notice and an opportunity to bargain. The complaint also alleges that the Respondent subcontracted unit work and laid off drivers in retaliation for their grievance-filing activities, in violation of Section 8(a)(3) and (1). The judge recommended dismissal of both allegations. We agree for the reasons that follow.

(1) The 8(a)(5) allegation: the duty to bargain about subcontracting

We adopt the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) by unilaterally subcontracting the bargaining unit's driving work, because the parties' collective-bargaining agreement entitled the Respondent to transfer work to any other entity, which we find included the right to unilaterally subcontract. We agree with the judge that the Respondent's outsourcing of its trucking operations was appropriately classified as subcontracting, which is a mandatory subject of bargaining. See *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210–212 (1964); *Bob's Big Boy Family Restaurants*, 264 NLRB 1369, 1370 (1982). Therefore, absent establishing that it was privileged to act unilaterally, the Respondent was obliged by the Act to bargain about both the decision to subcontract and the effects of its decision. *Fibreboard Paper Products*, 379 U.S. at 210–212; *Fresno Bee*, 339 NLRB 1214 (2003). We recognize and adhere firmly to the doctrine that a waiver of statutory rights is not to be lightly inferred but instead must be "clear and unmistakable." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983). We agree with the judge, however, and find that the Respondent established that it was privileged to act unilaterally because the management-rights clause of the parties' collective-bargaining agreement constitutes a clear and unmistakable waiver of the Union's right to bargain about the decision to subcontract. *Allison Corp.,* 330 NLRB 1363, 1365 (2000).

We have fully considered the cases cited by the General Counsel in arguing to the contrary. Some of these cases demonstrate that, in other circumstances, the Board

has found a union to have waived the right to bargain about subcontracting when the specific word "subcontracting" was used in the management-rights clause of the parties' collective-bargaining agreement. *Ingham Regional Medical Center*, 342 NLRB 1259, 1262 (2004); *Allison Corp.*, 330 NLRB at 1365. In *Reece Corp.*, 294 NLRB 448, 451 (1989), another case cited by the General Counsel, the Board found that a union did not clearly and unmistakably waive its right to bargain about the transfer of work between an employer's plants, although the union had expressly waived its right to bargain about a decision to subcontract. These cases establish that the Board adheres to a strict standard when evaluating whether a contract provision privileges one party to act unilaterally and without the other party's consent regarding a mandatory subject of bargaining.

Unlike the contract language in the cases cited by the General Counsel, however, here the parties' collective-bargaining agreement expressly and precisely stated that the Respondent retained the right "[t]o transfer any or all of its . . . work . . . to any other entity . . . ." The General Counsel argues that the words "subcontract" and "transfer" have different meanings, particularly in the context of labor relations. If the contractual language here had included the precise word "subcontract," then presumably there would be no dispute over its meaning. But the language at issue is nevertheless clear and unmistakable, even though it does not refer to subcontracting by name. "[T]ransfer . . . of . . . work . . . to any other entity" is a general formulation that necessarily includes the specific sort of transfer represented by subcontracting. Put somewhat differently, subcontracting cannot be accomplished without transferring work to another entity. There is no suggestion in the parties' bargaining history or past practice, moreover, that "transfer of work" somehow excluded subcontracting or, indeed, referred to anything other than subcontracting. For these reasons, we agree with the judge that the Union clearly and unmistakably waived the right to bargain about the Respondent's decision to subcontract the bargaining unit's work.[12]

(2) The 8(a)(3) allegation: the motive to subcontract the driving work

We also affirm the judge's conclusion that the Respondent's decision to lay off all the bargaining unit drivers and subcontract the driving work did not violate Section 8(a)(3) and (1). The judge found that the General Counsel met his initial burden to show that the employees' union activity was a motivating factor in the Respondent's decision. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399, 403 (1983). There are no exceptions to that finding. The judge then found that the Respondent demonstrated that it would have laid off all of the drivers for financial reasons, even in the absence of their union activities, and thus that the decision to subcontract and the resulting layoffs were not unlawful. *Wright Line*, 251 NLRB at 1089. We agree for the following reasons.

First, the record supports the Respondent's assertion that its decision to subcontract was a legitimate financial one that had been in the works since at least early 2009. As the judge found by that time the Respondent was engaging in "ongoing discussions with several contract carriers concerning contracting out [trucking] work and closing the trucking division." That finding is supported by the credited testimony of Chris Haas, president of All Pro Freight Systems, one of the companies that the Respondent has used for contract drivers. Haas testified that, by early 2009, Schill, at Pavlish's direction, had engaged in preliminary discussions with All Pro and, in the course of those discussions, had indicated that the Respondent wanted to reduce the costs associated with its trucking operations. Thus, the record supports the judge's finding that the Respondent had expressed a desire to reduce its trucking costs, and had actively explored subcontracting out the trucking work, long before the union activity at issue in this case had commenced.

Second, the judge credited Pavlish's testimony that he expected to save around $300,000 per year by terminating the trucking division.[13] That testimony establishes that the Respondent had sound financial reasons for sub-

[12] We do not rely on the judge's consideration of the additional language in the management-rights clause that entitles the Respondent to "[t]erminate or eliminate all or any part of its work or facilities." The evidence does not support the Respondent's assertion that it terminated its trucking operations; rather, we find the Respondent has maintained the trucking operations substantially intact, while subcontracting most of the labor involved.

We decline the Respondent's invitation to apply the "contract-coverage" standard in this case. As the Board has repeatedly explained, the clear and unmistakable waiver analysis is appropriate in 8(a)(5) cases where an employer asserts that a contract provision authorizes a unilateral change in working conditions. *Provena St. Joseph Medical Center*, 350 NLRB 808, 812 (2007). In any event, the result in this case would be the same under either standard. Inasmuch as the result would be the same, Member Johnson finds no need to express his view whether the Board should depart from the clear and unmistakable standard and adopt the "contract-coverage" standard. He acknowledges that there is at present no three-member majority in favor of reconsidering the long-established waiver standard.

[13] Pavlish's testimony in this regard is uncontroverted, and is also consistent with the other record evidence.

contracting its trucking operations separate from and unrelated to any antiunion animus.

Finally, the judge credited Pavlish's testimony that he had previously closed two other divisions of his Company when he had determined that they were not making money. Accordingly, the closing of the trucking division was consistent with the Respondent's past practice.[14]

The General Counsel contends that although the Respondent had been studying the possibility of subcontracting its trucking operations since early 2009, it had made no firm plans before the onset of union activities in late 2010. In that regard, the General Counsel notes that beginning in summer 2010, there was talk of a strike over the Respondent's change in health benefits, and several drivers filed grievances over subcontracting actions in fall 2010 and other matters unrelated to subcontracting. In view of these facts, the General Counsel urges that the Respondent has failed to show that it would have closed the trucking division and subcontracted all trucking operations for business reasons, even absent the drivers' protected conduct.

We are not persuaded. The drivers' union activities relied on by the General Counsel were comparatively minor in their impact on the Respondent. Several drivers filed subcontracting grievances in fall 2010, but those were about subcontracting that had already taken place. Drivers Zemaitis and Griffith also filed grievances, but those grievances concerned discipline over matters entirely unrelated to subcontracting. And although Mixon mentioned the possibility of a strike over the change in health benefits, there was no strike and, indeed, no strike threat. Like the judge, we find it difficult to believe that a smattering of comparatively low-level union activities such as these would have played a significant role in the Respondent's decision to shut down an entire division. In these circumstances, the timing of the decision relative to the drivers' protected activities is only weak evidence against the Respondent's affirmative defense. For the same reason, the fact that the Respondent had not made firm plans to subcontract the trucking operation before those activities commenced does little to undercut the Respondent's defense. Thus, although the factors cited by the General Counsel constitute some evidence to the contrary, we find that they do not outweigh the evidence, discussed above, supporting the Respondent's affirmative defense. Accordingly, the Respondent has shown, by a preponderance of the evidence, that it would have subcontracted the trucking work and laid off the unit drivers even absent their protected activities.[15]

D. The Respondent's Failure to Produce Information Related Either to the Decision to Subcontract or to the Union's Pending Grievance

The judge found, and we agree, that the Respondent's failure to produce information requested by the Union related to the effects of the decision to subcontract the bargaining unit work and to lay off the drivers violated Section 8(a)(5) and (1). Having found that the Respondent was not required to bargain about the decision itself, however, the judge found that the Respondent was not obligated to produce the remaining information requested by the Union, which he characterized as related solely to that decision. The General Counsel excepts to this finding, arguing that the judge should not have summarily rejected all of the requested information as irrelevant, but should have applied the Board's broad, discovery-type standard to determine whether the information was necessary and relevant to the Union's responsibility to represent the bargaining unit employees beyond the Union's asserted need for it to bargain about the decision. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435–436 (1967). The General Counsel argues that the Union needed the information to decide whether to file or process related grievances. *Beth Abraham Health Services*, 332 NLRB 1234 (2000).

We find merit in the General Counsel's exception to the extent that the Union's requests encompassed information related either to the Respondent's motive to subcontract or to its pending grievance.[16] When a party seeks information for a proper and legitimate purpose, it does not lose its entitlement to the information if there are other reasons for the request. *Ralphs Grocery Co.,* 352 NLRB 128, 135 (2008), adopted following remand by 355 NLRB 1279 (2010); *Associated General Contractors of California*, 242 NLRB 891, 894 (1979), enfd.

[14] The Respondent also did not immediately terminate the truckdrivers when it closed the trucking division, but instead offered them other *bargaining unit* positions, as it had done for employees who had been displaced by previous division closings.

Member Johnson notes that offering employees jobs elsewhere in the Company is directly contrary to how one might expect an employer to act if it was closing an operation based on a desire to rid itself of employees who were engaging in union activity. See, e.g., *Liquid Carbonic Corp.*, 277 NLRB 851, 858 (1985) (lack of animus finding is bolstered by the fact that employer later entered into a bargaining agreement covering the individuals previously employed at the closed facility).

[15] See *Merillat Industries*, 307 NLRB 1301, 1303 (1992) (respondent is required to establish its *Wright Line* defense only by a preponderance of the evidence; defense does not fail merely because not all the evidence supports it, or even if some evidence tends to negate it).

[16] Because the Board's findings make this information no longer necessary, and considering that it will not materially affect the remedy, Member Johnson finds it unnecessary to pass on whether the Respondent lawfully refrained from producing evidence related to its motive to subcontract.

in part 633 F.2d 766 (9th Cir. 1980). In its January 19, 2011 request for information, which includes a demand to bargain about the decision and effects of the purported closure of the trucking operations, the Union stated that, in light of its belief that the decision was retaliatory and a repudiation of the contract, it would be pursuing grievances and unfair labor practice charges, and it attached a class action grievance.

Similarly, in its January 28, 2011 letter following up on the original request and requesting additional information, the Union again mentioned that it believed the decision to subcontract was retaliatory and discussed the status of the class action grievance. Although the subcontracting information may not have been presumptively relevant, it is noteworthy that here, not only did the Union articulate that it was concerned that the decision was retaliatory, but, in fact, the record establishes that the Union had good reason to be concerned. The Union was entitled to information to evaluate the merit of proposed grievances and to determine whether to pursue them. Therefore, we find that because the Union was entitled to information related to the Respondent's motive for deciding to subcontract the driving work and to related information to the extent it was needed to determine whether to pursue the grievance it had filed, the Respondent's failure to provide that information violated Section 8(a)(5) and (1).

However, because we have determined that the Respondent's decision was not unlawful, we further find that the information requested is now moot, in that it is no longer necessary for the Union to evaluate the Respondent's motive to subcontract. Thus, we shall order the Respondent to cease and desist from failing to provide information relevant and necessary to the Union's role as exclusive bargaining representative, but we will not require the Respondent to produce the information that is no longer necessary.

E. The Relationship Between CSI and Turn-To Transport

Contrary to the judge, we find that CSI and Turn-To Transport constitute a single employer, and that Turn-To Transport was established by CSI about May 16, 2011, as a subordinate instrument, as alleged in the complaint. We find it unnecessary to decide whether the Respondents are also alter egos, as the complaint alleges, because doing so would not affect the remedy.

The single-employer and alter-ego doctrines are related but separate concepts. *Johnstown Corp.*, 322 NLRB 818 (1997). Single-employer issues arise when two businesses that are closely related operate at the same time. See, e.g., *Naperville Ready Mix, Inc.,* 329 NLRB 174, 179–180 (1999), enfd. 242 F.3d 744 (7th Cir. 2001). Alter-ego issues tend to arise either when a new entity replaces a predecessor or when entities operate consecutively. See *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d. 1305, 1310 (8th Cir. 1984). Here, Turn-To Transport replaced a part of CSI's trucking business and continued to operate alongside CSI, and we have determined that the factual scenario fits the single-employer theory. See *Three Sisters Sportswear Co.*, 312 NLRB 853, 863 (1993); *IL Progresso Italo Americano Publishing Co.*, 299 NLRB 270, 270–271 (1990).

In determining whether two nominally separate entities constitute a single employer, the Board examines four factors: (1) common ownership or financial control; (2) common management; (3) functional interrelations of operations; and (4) centralized control of labor relations. *Bolivar-Tees, Inc.,* 349 NLRB 720 (2007), enfd. 551 F.3d 722 (8th Cir. 2008); *Naperville Ready Mix*, 329 NLRB at 179. Although the Board considers centralized control of labor relations a significant indicator of single-employer status, no single aspect is controlling and all four factors are not required. *Bolivar-Tees*, 349 NLRB at 720, and cases cited therein. Single-employer status is characterized by the absence of an arm's-length relationship between nominally separate entities. Id.; *RBE Electronics of S.D.*, 320 NLRB 80 (1995).

We agree with the judge's finding, to which there are no exceptions, that CSI and Turn-To Transport share common ownership. Regarding the functional interrelationship of operations, common management, and centralized control of labor relations, which the judge found were not established, we find that judge failed to consider the whole picture. We find that the record clearly demonstrates the functional integration of the entities, and we find that the judge erred in concluding that there was no functional interrelationship between them. We also consider that Turn-To Transport performs very little work and appears to have little need for either labor relations or management, as it is primarily a company that primarily holds and leases trucks to CSI's major subcontractor, Cleveland Express Trucking Co. (CETCO), and itself employs only one driver. Thus, we conclude that, under these circumstances, the strong evidence of co-ownership and functional integration outweighs the lack of a showing of centralized control of labor relations or common management. Importantly, the record clearly shows an absence of an arm's-length relationship between CSI and Turn-To Transport and that Turn-To Transport exists primarily as a shell company that holds CSI's transportation equipment and leases the equipment back to CSI and CETCO.

In our view, the judge erred by relying on too narrow a view of the role played by Turn-To Transport's one employee driver and, therefore, failing to consider important facts related to Turn-To Transport's primary business as a truck-leasing company. The judge found that Turn-To Transport's one driver did not interact much with "CSI's contract drivers" and performed long-distance, rather than local driving; that CSI had not been in the truck-leasing business before Turn-To Transport was established; and that Pat Pavlish operated out of a separate office from CSI, appeared to have no interaction with CSI's contract drivers or CSI employees, and played no meaningful role in CSI's personnel practices.

The following pertinent facts, however, which we find support a finding of single-employer status, were not considered by the judge. Turn-To Transport's primary "operation" is to own the vehicles it purchased from CSI and to lease them to CETCO in order for CETCO to perform transportation services for CSI, which makes Turn-To Transport's primary operation entirely interrelated with CSI's operation. Although Turn-To Transport is primarily a vehicle owning and leasing company, it has no parking lot, garage, maintenance people, salespeople, or account representatives. Turn-To Transport's vehicles that are not leased to CETCO are housed at CSI's facility for no charge.[17] Even Turn-To Transport's one employee driver regularly hauls products to CSI, and he parks his vehicle at CSI when it is not at his home. Moreover, CSI "rents" the stored vehicles from Turn-To Transport on an as-needed basis. Although, as the judge observed, it may be true that Pat Pavlish has little, if any, interaction with CSI's contract drivers or CSI employees, she arguably has little contact with her own employee—she describes him as a former owner-operator who, in addition to the work he performs hauling for CSI, obtains additional work from the same broker used by CSI. That there is no overlapping management or labor relations is not surprising, because, in addition to there being only one employee who functions relatively independently, there is almost no "management" required at Turn-To Transport other than accounting. Pat Pavlish's primary residence is in Florida, where she stays for about 6 months a year; she testified that when she goes to Florida, she closes up her Turn-To Transport office and brings her cell phone and Turn-To Transport's checkbook with her. Apparently, that is all she needs to "run" Turn-To Transport for 6 months. Ed Pavlish also spends 6 months in Florida, but he admits that Schill runs CSI's day-to-day operations and that he returns to the plant periodically.

[17] CSI also permits CETCO to park vehicles and equipment at CSI.

We find it significant that Pat Pavlish continues to be a salaried employee of CSI, involved in its financial and accounting department, and that she used some of the resources at CSI to set up her company. Although both she and Schill denied it, the documentary evidence establishes that she relied on Schill and Schill's contacts to initially arrange her deal with CETCO, which was already in negotiations with Schill to contract the driving work from CSI. The terms of the deal she ultimately made with CETCO are very similar to the terms CETCO had been discussing with CSI. She relied on CSI's administrative personnel to transfer the licenses and insurance certifications for the trucks she acquired from CSI. She even relied on CSI's attorney to set up Turn-To Transport as a limited liability company. Finally, the deal she struck with CETCO to lease trucks was made on the same day and is designed to encompass the same amount of driving work as the deal CETCO entered into with CSI to perform the work.

By not considering these many facts related to the functional interrelationship of operations of CSI and Turn-To Transport in the single-employer analysis, the judge put undue emphasis on corporate form rather than function. Moreover, by emphasizing a lack of common management and labor relations in finding the entities independent, the judge failed to appropriately consider that Turn-To Transport's operations require very little of either. See *Bolivar Tees*, 349 NLRB at 722; *Three Sisters Sportswear*, 312 NLRB at 863. Similar to the transactions in *Naperville Ready Mix, Inc.*, the Pavlishes retained an ownership interest and substantial control of the vehicles used in CSI's transportation operations through the creation of what appears to be a shell company, Turn-To Transport. See *Naperville*, 329 NLRB at 180–181. The fact that Turn-To Transport employs one driver should not detract from its primary function as a shell company holding CSI's transportation equipment.

For the above reasons, we conclude that CSI and Turn-To Transport are a single employer, and we will hold the companies jointly liable for the unfair labor practices found.

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices in violation of Section 8(a)(5), (3), and (1) of the Act, we shall order that it cease and desist and take certain affirmative actions designed to effectuate the policies of the Act. In addition to the actions set forth in the judge's decision, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of the decision to subcontract the trucking work and to lay off the bargaining unit drivers, we

shall order the Respondent to bargain with the Union, on request, about the effects outsourcing the trucking operation. As a result of the Respondent's unlawful conduct, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the laid-off unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).[18]

Thus, the Respondent shall pay its laid-off unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of the outsourcing on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from the date on which the Respondent ceased its trucking operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). The Respondent shall also file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters for each affected employee, and compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

[18] See also *Live Oak Skilled Care & Manor*, 300 NLRB 1040 (1990).

ORDER

The National Labor Relations Board orders that the Respondent, Chemical Solvents, Inc. and Turn-To Transport, LLC, a single employer, Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals, discharge, or any other discipline as retaliation for their union or protected concerted activity, including discussing the possibility of work stoppages and the filing of grievances under the collective-bargaining agreement.

(b) Coercively inviting employees to resign their employment or offering them money to resign because they engage in union or protected concerted activities, including discussing the possibility of work stoppages or the filing of grievances under the collective-bargaining agreement.

(c) Verbally warning or otherwise discriminating against any employees for engaging in union or protected concerted activity, including discussing the possibility of work stoppages or the filing of grievances under the collective-bargaining agreement.

(d) Making unilateral changes by installing surveillance cameras, implementing cell phone usage policies, implementing pretrip inspection reporting requirements, or making changes to any other term and condition of employment without affording Teamsters Local Union 507, a/w International Brotherhood of Teamsters (the Union), adequate prior notice and an opportunity to bargain.

(e) Failing to timely provide the Union with information it requests that is relevant and necessary for it to fulfill its role as a collective-bargaining representative, including bargaining over the effects of the Respondent's decision to contract out bargaining unit work, and its duty to investigate, evaluate, and process grievances, and otherwise represent unit employees.

(f) Failing to bargain with the Union over the effects of decisions to subcontract bargaining unit work or lay off bargaining unit employees.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful verbal warning issued to Bill Zemaitis, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the following bargaining unit:

> All full-time and regular part-time production and maintenance employees and truck drivers, but excluding all office clerical employees, professional employees, and all guards and supervisors as defined in the Act.

(c) Remove, cover, or disable the surveillance cameras that were unilaterally installed in August and September 2010.

(d) Rescind the unilaterally implemented cell phone usage restrictions and the reporting requirements related to pretrip inspections instituted in September and October 2010.

(e) Provide the Union with the information that it requested on about January 19, 2011, that was relevant and necessary for it to bargain about the effects of the Respondent's decision to subcontract bargaining unit work and lay off unit drivers.

(f) On request, bargain with the Union about the effects on employees of the Respondent's decision to subcontract bargaining unit work and lay off unit drivers.

(g) Pay the laid-off drivers their normal wages for the times set forth in the amended remedy section of this decision.

(h) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(i) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay or other make-whole payments due under the terms of this order.

(j) Within 14 days after service by the Region, post at its facilities in Cleveland, Ohio, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices should be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2010.

(k) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 24, 2015

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with unspecified reprisals, discharge, or any other discipline because you engage in activity on behalf of Teamsters Local Union 507, a/w International Brotherhood of Teamsters (the Union), or in other protected activity, including discussing the possibility of work stoppages or the filing of grievances under the collective-bargaining agreement, or in order to discourage you from engaging in activities in support of the Union.

WE WILL NOT coercively invite you to resign your employment or offer you money to resign because you engaged in activity on behalf of the Union or in other protected activity, including discussing the possibility of work stoppages or the filing of grievances.

WE WILL NOT issue you verbal warnings or other discipline because you engage in activity on behalf of the Union or in other protected activity, including discussing the possibility of work stoppages or the filing of grievances.

WE WILL NOT install surveillance cameras, implement cell phone usage restrictions, implement reporting requirements related to pretrip inspections, or make changes to any other term and condition of employment without affording the Union adequate prior notice and an opportunity to bargain.

WE WILL NOT fail to provide the Union with information it requests that is relevant and necessary for it to fulfill its role as your exclusive collective-bargaining representative, including information related to bargaining over the effects of our decision to contract out bargaining unit work pursuant to the collective-bargaining agreement or lay off employees, and the duty to investigate, evaluate, and process grievances, or otherwise represent bargaining unit employees.

WE WILL NOT fail to bargain with the Union over the effects of our decision to subcontract bargaining unit work and lay off employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL provide the Union with the information that it requested on about January 19, 2011, that was relevant and necessary for it to bargain with us about the effects of our decision to subcontract our trucking work and lay off unit drivers.

WE WILL, upon request, bargain with the Union about the effects on employees of our decision to subcontract our trucking work and lay off unit drivers

WE WILL pay the drivers laid off as a result of our decision to subcontract our trucking work their normal wages for a period required by the Board's decision.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful verbal warning issued to Bill Zemaitis, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of our employees in the following bargaining unit:

> All full-time and regular part-time production and maintenance employees and truck drivers, but excluding all office clerical employees, professional employees, and all guards and supervisors as defined in the Act.

WE WILL remove, cover, or disable the surveillance cameras that we unilaterally installed in August and September 2010.

WE WILL rescind the cell phone usage restrictions and reporting requirements related to pretrip inspections that we unilaterally instituted in September and October 2010.

CHEMICAL SOLVENTS, INC. AND TURN-TO TRANSPORT, LLC, A SINGLE EMPLOYER

The Board's decision can be found at www.nlrb.gov/case/08-CA-039218 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Cheryl Sizemore, Esq., for the Acting General Counsel.
Thomas L. Colaluca, Esq. (The Colaluca Law Firm, LLC), of Cleveland, Ohio, for the Respondents.
David M. Ondrey (Thrasher, Dinsmore & Dolan), of Chardon, Ohio, for Respondent Turn-To.
James Petroff, Esq. (Faulkner, Hoffman & Phillips), of Cleveland, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter arises out of a second order consolidating cases, amended consolidated complaint and notice of hearing (the complaint) that the Acting General Counsel issued on October 26, 2011. The complaint stems from charges filed by Teamsters Local Union 507 a/w International Brotherhood of Teamsters (the Union) against Chemical Solvents, Inc. (CSI, the Company, or the Respondent) and Turn-To Transport, LLC (Turn-To). The Acting General Counsel alleges unfair labor practices (ULPs) under Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act). Pursuant to notice, I held a trial in Cleveland, Ohio, from January 17–24, 2012, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

(1) Did the Respondent, starting on November 5, 2010, phase out the use of bargaining unit truckdrivers (drivers), and eventually close the trucking division and replace all of them with drivers employed by outside carriers (contract drivers), without affording the Union an opportunity to bargain over the decision to replace them, and/or its effects?

(2) Did the Respondent phase out and close the trucking division because drivers engaged in union/protected activity?

(3) Did the Respondent, since on about January 19, 2011, fail and refuse to provide the Union with necessary and relevant information that the Union requested relative to the Respondent's decision to phase out and close the trucking division, and/or its effects?

(4) Are CSI and Turn-To a single employer/alter egos?

(5) Did the Respondent, on about September 1, 2010, unilaterally change and reduce the health insurance benefits available to bargaining unit employees, without affording the Union prior notice and an opportunity to bargain?

(6) Did the Respondent, in August and September 2010, install new surveillance cameras in or by its facilities, without affording the Union prior notice and an opportunity to bargain?

(7) Did the Respondent, in late October 2010, unilaterally change its disciplinary policy regarding truck inspections and drivers' use of cell phones, without affording the Union prior notice and an opportunity to bargain?

Although the complaint addresses only a unilateral change regarding use of cell phones, counsel for the Acting General Counsel contends in her brief that unlawful unilateral changes were made as to both. The Board may find and remedy a violation even in the absence of a specified allegation in the complaint, if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Garage Management Corp.,* 334 NLRB 940, 940 (2001); *Letter Carriers Local 3825 (Postal Service)*, 333 NLRB 343, 345 fn. 3 (2001). I find that to be the situation here, noting that both topics were discussed at the same meetings.

(8) Did Vice President of Operations Gerald (Jerry) Schill, on October 22 and 29, 2010, respectively, threaten drivers James Griffith and Bill Zemaitis with discipline if they violated company policies regarding cell phones and truck inspections, because they had engaged in union/protected activity?

The complaint addresses only threats regarding enforcement of the inspections' policy, but the Acting General Counsel's brief contends that the threats related to both policies. For the reasons stated above, I find consideration of both appropriate.

(9) Did Schill, on October 27, 2010, threaten Griffith with unspecified reprisals because he had engaged in union/protected activity?

(10) Did Schill, on November 8, 2010, threaten Zemaitis with discharge because he had engaged in union/protected activity?

(11) Did Schill, on November 8 and 9, 2010, respectively, solicit Griffith and Zemaitis to resign and offer them

money to resign, impliedly threatening discharge, because they had engaged in union/protected activity?

(12) Did Schill issue Zemaitis a verbal warning on November 11, 2010, relating to his pretrip inspection of a truck, in retaliation for Zemaitis' union/protected activity?\

(13) Did Supervisor John Mitchell, on about April 13 or 14, 2011, threaten shop employee Travis Hreha with unspecified reprisals because he had engaged in protected activity by advising contract drivers of safety issues?

(14) Did Mitchell, on about April 15, 2011, and later that month, threaten shop employees with layoff and/or discharge if they filed grievances under the collective-bargaining agreement?

Witnesses and Credibility

The witnesses were as follows:

Employees—Former drivers Griffith, Zemaitis, Joseph Cieslinski, and Kenneth Gloden; and material handlers Hreha and Charles Hughes.

Union agents—Secretary/Treasurer Albert Mixon and Attorney James Petroff.

Company agents—Schill and Mitchell, Sole Owner Ed Pavlish (Pavlish), his wife and Secretary/Treasurer Patricia Pavlish (Pat Pavlish), Traffic Manager John Jones, and Attorney Thomas Colaluca.

Representatives of other companies—Anthony Dattilo, Ph.D., owner of Enviro Matrix, Inc., which provides environmental regulatory compliance services to CSI; Bob Debevec, MBA, an owner of Clearpoint Partners, which provides accounting services to CSI; and Chris Haas, president and chief executive officer of All Pro Freight Systems, one of the companies that CSI has used for contract drivers.

Some witnesses were fully credible, others only partially so. I find it appropriate here to cite the well-established precept that "'[N]othing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony." *Jerry Ryce Builders,* 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). The trier of fact must consider the plausibility of a witness' testimony and appropriately weigh it with the evidence as a whole. *Golden Hours Convalescent Hospitals,* 182 NLRB 796, 797–799 (1970).

The Acting General Counsel called Hreha and Hughes, current CSI employees. Because current employees who testify against an employer run the risk of economic reprisal, their testimony is likely to be particularly reliable. *Jewish Home for the Elderly of Fairfield County,* 343 NLRB 1069, 1069 fn. 2 (2004), enfd. 174 Fed. Appx. 631 (2d Cir. 2006); *Shop-Rite Supermarket,* 231 NLRB 500, 505 fn. 22 (1997). Taking this and my observations of their demeanor into account, I find that Hreha and Hughes were credible, and I credit their versions of events where they differed from other witnesses.

I will further address credibility in the course of reciting the facts relative to individual allegations.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, and stipulations, as well as the thorough posttrial briefs that the Acting General Counsel and Attorney Colaluca filed, I find the following.

Background

The Respondent, an Ohio corporation, with an office and place of business in Cleveland, Ohio, customizes materials for paint formulation, paint purging, metal degreasing, and the cleaning of chemicals; and provides industrial chemicals in the recycling, treatment, and disposal of generated waste materials. Jurisdiction as alleged in the complaint is admitted, and I so find. Because CSI stores and transports hazardous materials, it is highly regulated by various agencies, including the United States Department of Homeland Security (DHS) and the Ohio Public Utilities Commission (PUC).

Sole Owner and President Pavlish opened the Company about 42 years ago. His wife, Pat Pavlish, is its secretary-treasurer. CSI has no other officers. Almost from the outset, it operated a trucking division.

On April 28, 1997, based upon a representation election held on April 17, 2007, the Union was certified as the exclusive bargaining representative of a unit composed of all full-time and regular part-time production and maintenance employees and truckdrivers, excluding office clerical employees, professional employees, and guards and supervisors as defined in the Act. CSI and the Union are parties to a collective-bargaining agreement, effective from May 1, 2007, until April 30, 2012.[1] This is their third labor agreement.

Article II of the agreement is the management-rights clause. I will later address the specific provisions of the management-rights clause relevant to the closing of the trucking division.

Article XIV sets out a grievance procedure. Step 1 is a meeting between the supervisor and the employee, at which a shop steward may be present. Step 2 provides that the grievance be reduced to writing and given to the Company's designated representative for a written response. The third step is arbitration, at the Union's option. There is no evidence that any grievances have gone to that stage. The employee handbook provides for four types of disciplinary action: verbal warning (documented), written warning, a 3-day suspension, and termination.[2]

Two facilities have been in operation, one called Jennings Road (Jennings) and the other Dennison Avenue (Dennison). At Dennison was the approximately 100-foot-long Luwa trailer, in which the drivers' lunchroom was located, along with a supervisor's office at each end. Management conducted meetings with employees in the trailer, outside of which was the drivers' smoking area.

At the beginning of 2011, the Respondent employed approximately 51 unit employees: 42 in production and maintenance (shop employees), and 9 drivers. All nine drivers were laid off that year, and CSI currently employs none. Contract drivers furnished by carriers All Pro Freight, Cleveland Express Trans-

[1] Jt. Exh. 1.

[2] R. Exh. 82, p. 15.

portation,[3] and DistTech now do all of the work that the drivers previously performed. At present, the Company employs approximately 42 unit production and maintenance employees, who work in various departments at Jennings.

ULPs Relating to Griffith and Zemaitis

All dates in this section occurred in 2010, unless otherwise indicated.

Of the witnesses who testified on these matters—Griffith, Zemaitis, and Hughes; and Schill and Jones—Hughes and Jones offered limited testimony but were the most fully credible. Hughes, who remains an employee, appeared candid and not to make any efforts to skew his testimony either for or against the Company. Jones' testimony was internally consistent, and he demonstrated candor; in particular, stating that the new GPS system installed in early 2009 was not helpful to him. Accordingly, I credit them where their testimony differed from the other three witnesses, whose testimony was flawed.

Griffith's testimony on the subject of cell phones was confusing because he jumped back and forth in terms of the sequence of events and was unclear whether Schill stated that drivers should not talk to each other while driving the vehicle or at any time while they were on the road.

Griffith's description of the cell phone policy prior to September 2 was somewhat contradictory. He testified that when the drivers got cell phones in the early 2000s, then Dispatcher John McNutt issued a memorandum stating that there was no problem if they talked among themselves because the Company did not pay for minutes, and they were permitted to give directions to other drivers or discuss business issues; however, he also testified that McNutt stated that the phones were not for personal use but were only for emergency purposes or to contact the Company.[4]

Finally, Griffith equivocated when asked whether Schill told him on October 22 that there would be a 30-minute time limit on both pretrip and posttrip inspections, finally conceding that Schill did not specifically mention posttrip inspections, but that Griffith assumed he meant both.[5] On the other hand, both Zemaitis and Schill testified that the latter only referenced pretrip inspections as far as the time limit, and I credit them.

Zemaitis' testimony about the bases for his November 12 grievance was hopelessly shifting.[6] In this regard, both Hughes' testimony of what occurred at the November 19 grievance meeting concerning Zemaitis' November 12 grievance, and the notations that Schill made on the face of the grievance, belie Zemaitis' testimony that the grievance was "probably" more over the verbal warning he received on November 11 than his November 9 conversation with Schill.[7]

I also note that Zemaitis and Griffith were not fully consistent in describing what Schill/Jones stated about cell phone use and inspection policies at their respective meetings, although I have no reason to believe that management articulated the policies differently to different drivers.

Schill appeared defensive and ill at ease during much of his testimony, especially when he was a 611(c) witness. Additionally, portions of his testimony lacked reliability. He testified that if a driver violates pretrip inspection procedures, it is dealt with immediately as a safety issue. However, he concededly allowed Zemaitis to drive off on November 9 after observing that he had not properly performed a pretrip inspection, and he further testified that it did not occur to him even to call Zemaitis as he drove out—inconsistent with a genuine major safety concern. Furthermore, Schill equivocated back and forth, to the point of evasion, in answering whether he warned Zemaitis and Griffith that violations of the cell phone and truck inspection policies would result in discipline.[8] Finally, after the Acting General Counsel had him read his NLRB affidavit, he testified that he in fact did, consistent with Zemaitis' testimony. Other defects in Schill's testimony will be addressed in subsequent portions of this decision.

Turning to the facts, Griffith was a driver from August 1982 until he resigned in June 2011. He had an interruption in employment in 2007 due to the following. He was the union steward for the drivers from 1998 until 2007. On about August 20 or 21, 2007, the drivers concertedly failed to show up for work. CSI viewed this action as unlawful, as reflected in General Counsel's Exhibit 10. It is undisputed that the Company held Griffith responsible as the union steward and terminated his employment on about August 23. He was rehired after about 1 or 1-1/2 months, without backpay, but never resumed his position as union steward. He testified without controversion that at the time of his rehire, both John Pavlish, Pavlish's son, and Schill made statements evincing anger at the drivers because of the work stoppage. Griffith filed a ULP charge over his termination but withdrew it after he was reinstated.

Zemaitis was employed as a driver from September 24, 2007, until he was laid off on February 1, 2011, for lack of work.

Traffic Manager Jones supervised the drivers. Hughes, a union shop steward for production employees, served as the union steward for the drivers in 2010 because they did not have their own steward. All grievance meetings subsequently described took place in Schill's office, with Hughes, Schill, Jones, and the grievant present. In this respect, I credit Hughes and find that Zemaitis attended the November 19 grievance meeting, over Zemaitis' testimony that he did not.

I. CELL PHONE POLICY PRIOR TO OCTOBER

On about September 2, a memorandum of that date, signed by Jones, was placed in employees' mailboxes.[9] It stated that the Company did not want drivers texting, talking, or making personal calls while driving and further stated that if drivers

[3] This company's vehicles originally had the logo CET, but it later changed to CETCO, perhaps reflecting a change in either corporate name or ownership. Their drivers remained the same. Some witnesses used the names interchangeably and, for purposes of simplicity, "CETCO" will be used for both.

[4] Tr. 94.

[5] Tr. 84, 85.

[6] See Tr. 305–309.

[7] Tr. 280.

[8] See Tr. 803–808.

[9] Jt. Exh. 8.

needed to talk to management, they should pull off the roadway at a safe place or go to a designated stop.

Determining the exact policy before September 2 is difficult, since Griffith was the only witness to testify thereon, and his testimony was confusing. He did testify that the memorandum changed the policy by not allowing talking while driving, and both he and Zemaitis testified that the practice was that drivers used them to get directions and information about customers from other drivers. Their testimony on point was plausible, and I credit it. No grievance was filed over the memorandum, and no driver was ever disciplined for violation of the cell phone policy, either before or after its issuance.

CSI implemented a new cell phone system in 2010 that gave it more information about drivers' cell phone use. The Company monitored drivers' cell phone use for a 1-week period starting on October 13, and determined that they were spending too much time on their cell phones.

II. PRETRIP AND POSTTRIP INSPECTIONS

Before going onto a public roadway, drivers had to make certain that their loads were properly secured, that the paperwork was in proper order, and that they conducted a thorough inspection of the vehicle, to see that the equipment was hooked up properly, there were no leaks, and the placards signifying hauling hazardous materials were displayed. Approximately 40 percent of the loads were of hazardous wastes. Upon returning to the facility, the driver conducted a thorough walk-through around the vehicle, to make certain there were no flat tires, the lights were still operating, there were no leaks, and everything was in proper order.

Griffith generally took 30–40 minutes for the pretrip inspections, sometimes even up to an hour, and 30 minutes for the posttrip inspections. Thirty minutes was sufficient for his pretrip inspections about 50 percent of the time. On a couple of earlier occasions prior to October 2010, management talked to him about his inspections taking longer than 30 minutes, but he was never disciplined. Griffith did not recall ever having seen anything in writing about a 30-minute time limit but did testify that management had mentioned it verbally in the past to drivers, in a group setting. Zemaitis took over 30 minutes for pretrip inspections on occasion but was never disciplined. There is no evidence that any driver was ever disciplined for taking more than 30 minutes for a pretrip inspection or for any other pretrip or posttrip dereliction at the facility. The record contains only one discipline for a load violation prior to October: on July 25, 2005, driver Scott Haught was disciplined after the PUC levied a fine of over $1600 because he was found to have a mislabeled and unsecured drum at a weight station.[10]

III. TRAINING SESSIONS AND SUBSEQUENT EVENTS

In approximately October, in Schill's office, Schill and Jones conducted training sessions with all drivers on the subjects of punch times, use of company cell phones, reading bills of lading, and pretrip and posttrip inspections.[11]

At both Griffith's session on October 22 and Zemaitis' session on October 29, management produced cell phone record.[12] Schill told each of them that they were abusing the company cell phone policy by talking too much on their cell phones and using them for personal reasons and/or casual conversations with other drivers, and that the cell phones were only for emergency use or to contact somebody in the company.[13] Consistent with the September 2 memorandum, Schill stated that drivers were not to use the cell phones while they were driving, for safety considerations.[14] Both Griffith and Zemaitis responded that the drivers used them for communicating directions and other business-related information to other drivers.

In each session, Schill brought up pretrip and postrip inspections. He stated that pretrip inspections were supposed to take only 30 minutes and if there was going to be a problem, to call him or submit a written report upon returning. According to Zemaitis, calling in for anything over 30 minutes or submitting a written report afterward was a new requirement. Neither Schill nor Jones testified to the contrary, and I so find. Both Griffith and Zemaitis replied that pretrip inspections sometimes took over 30 minutes.

Corroborating Griffith's and Zemaitis' accounts, Schill admittedly told them that future violations of either cell phone or pretrip truck inspection policies would result in discipline,[15] and I so find.

On October 27, Griffith initiated a conversation with Schill in the latter's office, with Jones also present. Griffith stated that he wanted to talk about what Schill had said at the October 22 meeting, saying that he felt that he had been singled out and harassed because management had spoken only to him and two other drivers. Schill responded, "[Y]ou're starting to piss me off. I'm—we're starting to regret the fact that we hired you back in 2007."[16] Griffith asked why Schill had made those comments, which had nothing to do with what Schill had talked about at the earlier meeting. Schill did not reply.

Griffith filed a grievance on November 2, contending that Schill had caused a hostile work environment by his statements at the October 27 meeting.[17] No specific contractual provisions were referenced, and Griffith used that terminology at the behest of Mixon or Business Agent Tommy Zdanowicz.

A first-step grievance meeting took place on November 8. Griffith stated that he wanted an apology, but Schill refused. Based on Hughes' credited testimony, I find that they went back and forth, that their exchange grew heated, and that Hughes tried to calm them down. Schill asked what Griffith wanted to do with the grievance, and Griffith responded nothing at that point. The Union did not take the grievance to the next step.

After the grievance meeting, Griffith had a conversation with Schill outside the building. Schill stated that he had talked to

[10] R. Exh. 53.

[11] See R. Exh. 156, the October 29 training attendance form for Zemaitis. The topics are listed, but no specifics are set out.

[12] R. Exh. 155, Zemaitis' cell phone usage printouts.

[13] Griffith and Schill so testified, consistent with the September 2 memorandum.

[14] Credited testimony of Schill and Jones.

[15] Tr. 808.

[16] Tr. 102.

[17] GC Exh. 3.

Pavlish, and "[w]e think it would be in your best interest to start looking for other employment, and we are willing to offer you some money to just walk away from Chemical Solvents."[18] Griffith asked why Schill would say that. Schill replied, because he knew some things. Griffith asked if they had an issue with his work or abilities. Schill answered no. Griffith asked, why then? Schill did not respond to the question but said that Griffith needed to think about it and get back to him.

Zemaitis filed a grievance on November 2,[19] contending that Schill had caused "a hostile work environment" by his statements at the October 29 meeting. Zemaitis was not aware of any specific contractual provision but used terminology that Zdanowicz suggested.

A grievance meeting was held on November 8, at which Zemaitis raised two additional incidents. Thus, he told Schill that he did not appreciate Schill's hanging up the phone on him when he called to have a customer informed that he was running late, and Schill's shoving him in the lunchroom 2 weeks earlier. Schill responded that Zemaitis was "on a very thin rope. He was watching every move I made, and I was about to lose my job."[20] The meeting ended without resolution of the grievance.

Zemaitis testified that the followed morning, November 9, Schill came up to him at the dock and said there would no longer be any work for him by the end of the week and that Schill wanted him out. Zemaitis asked for what? Schill replied, "[F]or your lies and false accusations you made in my office yesterday."[21] Zemaitis denied making any lies. Schill walked away but then returned and said that he had talked to Pavlish the preceding evening and that the Company could help Zemaitis out with money or finding him another job but wanted him out by the end of the week.

That same morning, Schill allegedly observed Zemaitis drive away without properly performing a pretrip inspection, i.e., not going inside the trailer to verify his load. Schill testified that the main concern of pretrip inspection is safety and that securing a load must be done at both pretrip and posttrip; if a violation is observed, it is dealt with immediately as a safety issue. However, he did not attempt to stop Zemaitis from leaving; indeed, he testified that it did not occur to him to call Zemaitis immediately as soon as he drove off.

On November 11, Schill issued a verbal warning to Zemaitis his November 9 preinspection.[22] Present were Zemaitis and Hughes, and Schill and Jones. Zemaitis disputed the basis of the warning, as reflected by his employee statement on the warning. Schill responded that Zemaitis had just shut the doors and pulled out but that Schill would review the camera.

On November 12, Zemaitis filed a grievance over Schill's' "comments" on November 11, referring back to November 9 (possibly meaning November 8), again contending creation of a hostile working environment.[23] Schill's issuance of the verbal warning was not specifically mentioned in the grievance. Zemaitis gave shifting reasons for why he filed the grievance, particularly on cross-examination.[24]

A grievance meeting took place on November 19. I credit Hughes uncontroverted testimony and find that Schill and Zemaitis were unable to come to an agreement of "why [Zemaitis] filed a grievance, what was the grievance about, what comments were made," and, consistent with what Schill wrote on the grievance, that Schill rejected it for not being specific in nature.[25] In light of this, I cannot accept Zemaitis' testimony that the grievance was "probably over the discipline, more than the conversation."[26] Indeed, based on the language of the grievance itself, Hughes' testimony about the difficulty Zemaitis had specifying its basis, and Zemaitis' equivocal testimony, I doubt that the warning was a major issue—if it was raised at all. In any event, the Union did not take either of Zemaitis' grievances to the next step of the grievance procedure.

Schill specifically denied stating to Zemaitis that the Company wanted him out by the end of the week, or words to that effect, but did not specifically deny offering Zemaitis money to leave. Nor did he specifically deny telling Griffith that the Company wanted him out and offering him money to leave. In view of this, other issues with Schill's credibility, and Griffith's and Zemaitis' similar but not identical testimony, I credit their accounts and so find.

Mitchell's Statements in April 2011

All dates in this section occurred in 2011.

Mitchell is the second-shift or night-shift supervisor over 16 employees, all of whom are in the bargaining unit. One of them is material handler 2 Hreha.

A current employee, Hreha was clearly a reluctant witness for the Acting General Counsel, as reflected by his statement that "I didn't want to come in today."[27] He appeared candid and not to be making any deliberate efforts to slant his testimony either for or against CSI. These considerations lead me to conclude that his testimony was reliable. I note that the Respondent's counsel brought up on cross-examination that Hreha's NLRB affidavit mentioned only one incident, a special meeting, in which Mitchell threatened employees about filing grievances, whereas Hreha testified about additional incidents during the same time period. However, the parties stipulated that nothing in the affidavit was necessarily inconsistent with there having been other occasions, and I therefore do not find that Hreha was impeached by his affidavit. Based on all of the above, I credit Hreha's accounts of Mitchell's statements over the latter's denials.

[18] Tr. 113.
[19] GC Exh. 5.
[20] Tr. 259. As previously stated, neither Zemaitis nor Schill were completely credible witnesses, but on this point, I credit Zemaitis. I do not believe that he would have made up these statements. I am also convinced from the evidence, as well as Schill's demeanor, that he was prone to use intemperate language.
[21] Tr. 270.
[22] Jt. Exh. 9.
[23] GC Exh. 6.
[24] See Tr. 305–309.
[25] Tr. 488; GC Exh. 6.
[26] Tr. 280.
[27] Tr. 743.

On about April 13 or 14, Mitchell and Hreha had a conversation in Mitchell's office in the Luwa trailer. Mitchell accused Hreha of having a bad attitude and said that he did not want him talking to the new driver (George) whom CSI was hiring. Hreha denied having a bad attitude, stating that he was merely alerting new drivers of safety concerns when dealing with hazardous chemicals. Mitchell told him not to talk to them and not to let the subcontracting to outside carriers fail. Hreha explained some of the safety concerns and said that he was not trying to scare them from doing their jobs. Mitchell responded that he now understood what Hreha was doing, and he essentially apologized. They never again had a similar conversation.

On about April 15, Mitchell conducted a special meeting with six production employees, including Hreha, in the lunchroom in the Luwa trailer. Mitchell brought up recent production issues. He mentioned that a new person (George) was being hired to work with the new drivers from outside carriers who were coming in, and for the employees to help him become familiar with the Company's paperwork and operations. Mitchell also told them not to complain about having to stay to complete last-minute orders, and "don't be filing any grievances about it, because you'll end up like your drivers."[28] An employee asked what he meant, and Mitchell replied, "Well, you know, your drivers don't really have a strong union."[29]

On two or so later occasions in the April time period, Mitchell, in the trailer, told employees (including Hreha) on break that if they filed a grievance, they would end up like the drivers. On at least one of those instances, Mitchell "snickered and smiled,"[30] leading Hreha to believe that he was attempting to be humorous.

Changes in Health Insurance Benefits

All dates in this section occurred in 2010 unless otherwise indicated.

Only two witnesses testified about meetings between the Union and the Company on the subject: Mixon and Cieslinski, who testified solely on the November 1 meeting. Their accounts of that meeting were similar.

The Acting General Counsel refreshed Mixon's memory with notes that Business Agent and Recording Secretary Ray Brown took at the July 29 and August 5 meetings on the Union's behalf, but then objected to them being received as Respondent's exhibits on the basis that they constituted inadmissible hearsay. I overruled those objections and admitted Respondent's Exhibits 151 and 152. In this regard, the Board does "not invoke a technical rule of exclusion but admit[s] hearsay evidence and give[s] such weight as its inherent quality justifies." *Midland Hilton & Towers,* 324 NRB 1141, 1141 fn. 1 (1997), citing *Alvin J. Bart & Co.,* 236 NLRB 242, 242 (1978), enf. denied on other grounds 598 F.2d 1267 (2d Cir. 1979). Thus, hearsay evidence may be admitted "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence." Ibid, citing *RJR Communication*s, *Inc.,* 248 NLRB 920, 921 (1980). Here, Mixon testified that the notes were substantially accurate. Accordingly, I adhere to my ruling that the notes were properly admissible, with the caveat that, as Mixon testified, they did not reflect everything that was stated at the meetings.

I note that Mixon somewhat conveniently did not recall certain facts until he was asked about them on cross-examination. Nevertheless, I am satisfied that his unrebutted testimony, as refreshed by the notes, was reliable, and I credit it.

Article XVI is the provision of the collective-bargaining agreement (Jt. Exh. 1) concerning employees' health insurance benefits. In relevant part, it provides that unit employees receive the same health insurance benefits as all other employees covered by the Company's health plan, that for the term of the agreement, the Company will pay any yearly increase in the total premiums up to 7 percent and the employee up to 3 percent, and that:

> The Company has the right to obtain comparable insurance during the term of this Agreement, but if comparable insurance cannot be obtained that does not exceed the yearly caps (7% for the Employer and 3% for the Employee), then both the Company and the Union will reopen negotiations on Health Insurance Coverage.

The Company's health insurance program covered all employees, not only unit members.

By March 15, the Company was aware that in order for the current insurer (Kaiser) to continue existing benefits, it would raise premiums by 23 percent, with the alternative being to increase premiums by 10 percent but reduce benefits.[31] By letter dated July 14,[32] Attorney Colaluca notified Mixon that CSI's current health insurance contract expired on August 1, that the provider had notified the Company that it would renew coverage but with an increase in premiums in excess of 20 percent. He then explained that over the past month, CSI had unsuccessfully sought to find alternatives that would provide similar coverage with increases in premiums that were reasonable or within the 10 percent referenced in the collective-bargaining agreement. Thus, either benefits would be reduced or premiums increased. Colaluca referred to the contractual provision quoted above and offered to meet and discuss alternatives.

On the same date, Colaluca sent Mixon an email,[33] stating that keeping the plan the same would result in a cost increase of 23 percent, and proposing two options:

1) Accept changes to the Kaiser benefit plan that would reduce the total premium increase to 8.9 percent, with CSI paying 70% of the increase, the employee 30%. Current dental plan coverage would be eliminated, and employees would have deductibles and increased co-payments.
2) Accept the same plan and including dental insurance for which employees would have to pay the entire premiums.

[28] Tr. 733.
[29] Ibid.
[30] Tr. 742.
[31] See R. Exh. 100, a letter from Paul Catania, a health insurance consultant, to Colaluca.
[32] Jt. Exh. 2.
[33] Jt. Exh. 3.

On about July 23, the Company posted a memorandum to employees, with attachments, advising them that maintaining current health insurance benefits would carry a 23-percent increase, that other carriers would be more expensive, and that the Company was staying with Kaiser.[34] By the terms of the collective-bargaining agreement, CSI would pay 7 percent of the increase, and employees 3 percent. There would be no dental benefits under Kaiser, but such insurance would be offered by Sun Life. If employees chose to opt out of CSI's health plan, they would be paid $3000 for a family or $1200 for an individual, paid quarterly. The new plan would go into effect on August 1.

As reflected in one of the attachments, there would be annual deductibles, ranging from $250 to $1500, depending on whether coverage was individual or family and on which of three Kaiser plans was selected. Another attachment was an employee's benefit election form, with the instruction to select Kaiser HMO or Kaiser POS, and to elect or waive Sun Life dental coverage, and return the form no later than July 30.

On about July 28, the Company posted a memorandum to employees, with the same attachments as those that were with the July 23 memorandum.[35] It stated that employees needed to fill out and submit the election form by July 30 at 3 p.m., or they would be enrolled in the current plan without dental.

On July 29, union and company representatives met at the Company (all subsequent meetings on health insurance took place there). Those in attendance included Brown, Hughes, and Mixon, Colaluca, and Schill. Mixon stated that the Union felt the changes to the health insurance benefits were egregious and that the Company had given the Union short notice. Mixon asked if the Company had to make the changes and if the Union could have an extension of time to respond. Colaluca said that the collective-bargaining agreement gave the Company the right to modify health and welfare benefits. Mixon agreed but said that the changes had to be comparable. Colaluca replied that the $30,000 cost necessary to maintain existing benefits would have to be split 50-50 between the Company and the employees. Mixon replied that this was unacceptable. Mixon stated that the Union wanted to make certain that employees would not lose dental insurance. Colaluca replied that they would have to pay the full cost thereof.

Colaluca repeatedly said that the Company was in a dilemma; unless the Union could offer assistance in resolving the problem, the Company's proposal was the best it could offer because the Company was not willing to absorb the increase necessary to maintain the current benefit structure. He reviewed the options described in his July 14 email to Mixon. During the meeting, Mixon and Colaluca agreed that the problem was Kaiser and usage, and they discussed how to keep premiums at 10 percent. Colaluca asked the Union to present a proposal to resolve the problem, and Mixon gave him some figures regarding the Bakers and Teamsters plan, which was strictly for family coverage, as opposed to the Company's plan that provided for both family and individual coverage. Colaluca responded that most employees were in single coverage and that the costs would be $800–$1000 more per person and thus too expensive. Mixon replied that such plan offered better benefits because it included retirees' health benefits, which the Company's did not. The premium costs that the Union quoted were over 10 percent.

Colaluca stated that Kaiser would terminate coverage on August 1 if the Company did not agree to the increases. At the conclusion of the meeting, the Union asked to meet with unit members the following morning at the Company's premises, and Colaluca agreed. Such a meeting did take place on July 30. During the course of that meeting, Mixon told employees that a strike might be necessary.

On August 1, Colaluca sent Mixon an email, stating that if an alternative plan with the same core benefits at the contractually-agreed price could be found, CSI could opt out of the present plan with a 30-day notice.[36] He asked for dates when they could meet. Colaluca also accused Mixon of making "incendiary" statements to employees concerning a work stoppage.

On August 5, another meeting between CSI and the Union took place. Present were Brown, Hughes, Mixon, and Zdanowicz; Colaluca, Schill and, apparently, John Pavlish.[37] Colaluca again referenced Mixon's July 30 statements to employees about a strike. Mixon explained that he had stated that if the contract was reopened and the parties were unable to reach an agreement, a strike might occur. He continued to ask the Company if it could maintain the current coverage, to which Colaluca replied no. Schill stated that the health insurance plan was based on usage, and many employees used it at a high level. Mixon stated that he wanted to explore cost comparison of the Union's plan and the Company's plan and asked if the Company could absorb the increased costs of the existing plan on an interim basis, to which Colaluca again responded no. Another meeting was scheduled for August 10.

At the August 10 meeting, Mixon presented details about the Bakers and Teamsters plan.[38] Either at this or the previous meeting, Catania provided information that the Union had earlier requested, and he answered questions.

By letter dated August 19 to Schill, Mixon requested reopening of the contract on health insurance, pursuant to article XVI.[39] Colaluca responded by an undated letter that he created on August 23, in which he opined that the parties were already engaged in negotiating health insurance provisions, stated that he had attempted without success to contact Mixon on numerous occasions to discuss the subject, and offered to meet at mutually convenient times to continue discussions.[40]

At a union meeting on August 25, Cieslinski, Hughes, and Anthony Porter were elected to be on the Union's negotiating committee.

A meeting was scheduled on September 24 or 25 but did not take place because not everyone on the Union's negotiating committee showed up. It was rescheduled for November 1.

[34] Jt. Exh. 4.
[35] Jt. Exh. 5.
[36] Jt. Exh. 6.
[37] R. Exh. 153, p. 1.
[38] See R. Exh. 132.
[39] Jt. Exh. 7.
[40] R. Exh. 34. See Tr. 1185.

At the November 1 meeting, Mixon and Zdanowicz, and maybe Brown, as well as the three drivers named above, attended for the Union. John Pavlish and Schill represented CSI. Mixon stated that the employees had a right to strike because the Respondent had violated the contract. He detailed his problems with the new plan and reminded them of the Union's reopener. Schill said that without Colaluca or Pavlish being present, he lacked authority and that he would talk to Pavlish and get his ideas. The meeting ended with Schill stating that he would contact Mixon or Zdanowicz to set up another meeting. No further meetings or other negotiations occurred.

CSI went with the health insurance program in which benefits were not comparable but the Company absorbed all of the increases in premiums. Company-paid dental and life insurance benefits were eliminated. These changes went into effect on September 1, Kaiser having agreed to a 1-month extension.

Installation of New Surveillance Cameras in August–September 2010

All dates in this section occurred in 2010.

The pertinent facts are basically uncontroverted, since Cieslinski, Hughes, and Schill were not inconsistent in relating what occurred. Dr. Dattilo, CSI's consultant on compliance with various environmental regulations, testified on his recommendations regarding the new surveillance cameras (the cameras). The Acting General Counsel did not dispute his credentials as an expert witness, and I have no reason to doubt them or his overall truthfulness. Accordingly, I credit his testimony.

Nothing in the collective-bargaining agreement specifically addresses surveillance cameras or security in general. The Respondent admits that it did not notify or bargain with the Union over the cameras' installation. One camera had been in place at Jennings for approximately 7 or 8 years. It oversaw the parking lot and entrance thereto. Dennison had no such cameras prior to August. Each facility has a separate parking lot used by employees. For at least 7 years, a sign at the entrance to each parking lot had read, "Warning TV camera system is monitored and recorded 24 hours a day."[41]

In March, through Dattilo, CSI filed a site security plan with DHS, one component of which was detection of threats. DHS' preferred means of detection is closed-circuit television cameras. Prior to making the report, he recommended that CSI install additional camera, additional lighting, and cyber-security enhancement, having come to the conclusion that they were needed to comply with DHS standards. He later notified DHS that CSI had taken these steps.

Pursuant to Dattilo's recommendation, four new cameras were installed at Jennings,[42] and nine at Dennison.[43] All were mounted on telephone poles by lighted areas so that they were clearly visible. Some faced areas where drivers and other unit employees worked, including the main warehouse, storage warehouse, docks areas, some entryways, and the Luwa trailer. The cameras were fixed focus and did not have the capability of being able to zoom in. None had an audio component.

Installation of the new cameras began in approximately mid-August and was completed in approximately mid-September. Cieslinski filed a grievance on November 22, contending that they were being used to evaluate employees' job performances, not for security reasons.[44] He testified that he based this conclusion on where the cameras were placed. No evidence supports this assertion.

Phasing Out and Closing of the Trucking Division

I. LANGUAGE IN THE COLLECTIVE-BARGAINING AGREEMENT

Provisions in the labor agreement relevant to this section are as follows. Article II, paragraph 1 is the management-rights clause. It starts off with the statement, "The management of the business in all of its phases and details shall remain vested in the Employer." Paragraph 1 goes on to provide that the Company has the right to:

> (13) [C]onsolidate, merge, or otherwise transfer any or all of its facilities, property, or processes or work with or to any other entity . . . .
>
> (14) [T]erminate or eliminate all or any part of its work or facilities.

Article I, paragraph 3 contains a "zipper clause" stating, inter alia, the parties' acknowledgement that during the negotiations which preceded the agreement, each had the unlimited right and opportunity to make demands and proposals and that their understandings and agreements arrived at after the exercise of that right and opportunity were set forth in the agreement.

Article III, paragraph 1 guarantees 40 hours pay to employees who report to work on 5 days in any given week.

Subcontracting or outsourcing of work is not per se addressed in the agreement. It is undisputed that in contract negotiations in 2007, the Union proposed a new provision:[45]

> The Company will not, so long as equipment and personnel are available, subcontract work which is customarily performed by employees in the bargaining unit to any other of its plants or branches or to any other company's plants or branches. The Company is absolutely prohibited from using the employees of another Employer to perform any bargaining unit work.

The Company's rejection of that provision is also undisputed. The disagreement is over Mixon's testimony that he said the purpose of the language was to memorialize existing practice. Mixon was inconsistent on Attorney Colaluca's response, first testifying that Colaluca replied that practice was embodied in article XIV, paragraph 1 and that the proposed second paragraph was unnecessary but then, after equivocating, that the Company made no comment on the paragraph but simply said

[41] R. Exh. 71.

[42] See R. Exh. 158, a schemata of Jennings. Camera locations and their fields of view are marked at C1–C5. C1 shows the preexisting camera; the others the new cameras.

[43] See R. Exh. 160, a schemata of Dennison showing the same information as R. Exh. 158, at C1–C9. C5 overlooks the Luwa trailer and a row of hazardous waste totes.

[44] GC Exh. 15.

[45] R. Exh. 12, p. 126 (art. XIV, par. 2). Art. XIV became art. XIII in the 2007–2012 agreement.

no.[46] Nothing in the provision mentions past practice; drivers Gloden and Griffith were consistent in testifying that there were special situations when CSI did outsource driving to other companies; and CSI provided records showing use of carriers in 2008 and 2009. Accordingly, I do not credit Mixon either as far as his making the statement or to its actually reflecting CSI's practices at the time of the negotiations.

II. THE TRUCKING OPERATION PRIOR TO AND AFTER NOVEMBER 5, 2010

I first turn to the witnesses on this matter. As stated earlier, Hughes was a credible witness, and I credit him. I note that his testimony about Schill's responses to the grievances that were filed on the subject was consistent with Schill's. Gloden appeared candid, and nothing in his testimony was contradictory or implausible; his testimony about Turn-To's driver at the facility comported with Pat Pavlish's. Therefore, I credit him as well. Although Griffith's testimony on one point was inconsistent, he was otherwise internally consistent, plausible, and consistent with Hughes and Gloden. Accordingly, I credit all other aspects of his testimony herein. I credit Gloden and Griffith where their testimony conflicted with Schill's.

Drivers used two types of CSI-owned equipment: tractors (also called cabs), the driving units, and trailers (vans and tankers), the pulling units, all of which were covered by a master insurance policy.[47] Prior to November 5, 2010, CSI had nine drivers, whom Jones dispatched on a daily basis. They had no fixed customers. A computer-generated daily drivers manifest (DDM) was prepared by Jones the previous evening and showed drivers' assignments for the day. A number of copies of the manifest were run off and maintained at various locations within the facility, so that drivers had access to it when they arrived for work in the morning. It contained a variety of information, including the driver, driving and pulling units, start time, list of customers, and the quantities or amounts delivered or picked up. DDMs, which are not required by law, were and are normally kept for about 3 months and then discarded.

Not all shipments were reported on the DDMs that Jones prepared. These included shipments out of the recycling department and commodities division, and bulk or freight waste shipments out of the shipping department. The Company used outside carriers to carry out freight waste because the Company had elected not to buy the special equipment needed. Drivers only infrequently transported freight waste, when necessary. Further, some trucks were usually loaded in the evening and did not appear on the DDM.

Prior to November 5, 2010, several different carriers were occasionally used, if a job was outside of the drivers' normal geographical area, there was too much work for the drivers to handle, or a customer specifically requested a particular carrier.[48] Additionally, nonunit drivers handled less-than-a-truckload deliveries, which drivers took only occasionally. During the last few years of the drivers' employment, their geographical area was Indiana, Michigan, New Jersey, Ohio, Pennsylvania, and West Virginia. During the 6-month period prior to November 5, 2010, drivers worked between 55 and 60 hours a week (the DOT maximum is 60). The carriers, at least generally, used their own equipment, not CSI's.

Driver Haught filed a grievance on March 20, 2009, concerning outsourcing to Thomas Transport that day; Schill denied it with the explanation that it was "more cost effective."[49] Neither the grievance nor the Company's response referenced any provision in the labor agreement.

The only time that a carrier was utilized on a recurring basis before November 5, 2010, was on November 9 and 19, 2009, when All Pro drivers were used for three deliveries.[50] In late November or early December 2009, the drivers initiated a meeting with Pavlish, Schill, and Jones. They voiced their concerns about contract drivers coming in on a daily basis to perform their work and how that would affect their jobs. Pavlish did most of the talking. He stated that the Company was exploring its options ("testing the waters") regarding the use of carriers.[51] He also stated that management was trying to cut down on what they thought was too much drivers' overtime. A driver produced safety records relating to All Pro, and Pavlish responded that he would analyze everything and make a decision. The drivers also raised concerns over the safety and/or age of certain CSI trailers, and Pavlish replied that he would fix or replace them. During the meeting, Pavlish complimented the drivers for their good job. Within a couple of weeks afterward, All Pro drivers were no longer used. No grievance was filed.

Starting on November 5, 2010, and continuing thereafter on a regular basis, All Pro Freight drivers hauled some of the deliveries that drivers normally performed.[52] Within a month or two, CETCO and DistTech drivers were also at the facility. Beginning in approximately October 2011, a Turn-To driver operated out of the facility. As time went on, carriers increasingly replaced drivers, who were laid off in stages.[53] At first, the carriers drivers used their own tractors but pulled CSI trailers; later, they used their own trailers. In the beginning, the names of carriers were not included in the DDM, but eventually they were.

Eleven grievances were filed over the use of contract drivers in lieu of drivers between October 4, 2010 and January 31, 2011.[54] Zemaitis filed the first of these, and Gloden later filed three, Ray Fink and David Lahner two each, and Thomas Benedict and Griffith one each. Griffith's was the last. One grievance was filed on behalf of "all drivers."

[46] Tr. 655–656.

[47] See GC Exh. 22.

[48] See R. Exh. 2, a shipping log of carriers that CSI used during the period from April 2008–May 2009; R. Exh. 111, invoices showing Thomas Freight deliveries to CSI customers on September 2–4, 2009.

[49] GC Exh. 23.

[50] See R. Exh. 153, p. 1.

[51] Testimony of Griffith at Tr. 155.

[52] R. Exh. 153, pp. 1–6.

[53] See, e.g., GC Exh. 24, the DDM for August 18, 2011, showing two DistTech drivers, four CETCO drivers, one All Pro driver, and three drivers. See also GC Exh. 31, copies of CETCO's invoices for services performed for CSI from March 7–May 6, 2011.

[54] GC Exh. 17.

These grievances contended in various ways that the Company had violated the labor agreement by using carriers to perform unit work when the driver had not reached 40 hours for the week. At each meeting, Schill responded that the agreement did require that the driver receive 40 hours but that the Company had the right to outsource the work.

By letter dated February 4, Schill notified Mixon that three drivers were being laid off pursuant to articles I and VII of the labor agreement.[55] Each employee would receive 1 week's severance plus any accrued benefits, or a position within the bargaining unit. He requested a decision by February 11 or would assume they would take the severance package. He also offered to meet to discuss the effects of the layoff. The position within the bargaining unit was not specified, but Schill informed them it would be as a material handler 3 in the shop. This was the entry-level classification for material handler and paid less than the drivers were making. Of the nine drivers, one retired, three resigned, and five were laid off. None of them accepted the offer of continued employment. The deadline for response was subsequently extended.

CSI laid off drivers as follows:

1) Benedict, Lahner, and Zemaitis on February 4, 2011.
2) Cieslinski on April 20, 2011.
3) David Mayer on November 23, 2011.
4) Gloden on December 16, 2011.

III. CSI'S EXPLORATION OF USE OF OUTSIDE CARRIERS

Chris Haas of All Pro appeared candid, and his testimony was internally consistent and not contradicted by other evidence of record. He presently does some work for CSI, but I do not believe that he skewed his testimony in its favor. I take into account that he was questioned in detail about a series of communications with CSI that occurred over a duration of more than 1-1/2 years, leading to some natural diminution of recall. Accordingly, I credit him and find as follows.

All Pro is engaged in providing transportation, warehousing, and distribution for approximately 350 companies across the country. It employs about 150 drivers and has also utilized drivers contracted from a freight-brokerage company.

In 2009, John Pavlish advised Haas that Pavlish might have some trucking opportunities. Haas called Schill and they had a first meeting in about March 2009, at which Schill stated that he knew All Pro provided dedicated services to several Cleveland-area companies. He explained CSI's setup and wanted to know what All Pro could do. He emphasized that CSI wished to reduce costs in certain areas, including trucking. Haas said that he could provide trucking services, either fully or partially. At some point, possibly at that meeting, Schill stated that CSI wanted a quote for trucking work aside from the dedicated fleet.

They held a second meeting in about July 2009. Schill asked where Haas was with the quote. Haas asked for more information to come up with a cost structure. Schill provided him with the numbers of drivers and equipment. At the time, Haas did not know if All Pro would buy or lease CSI's equipment or use it at all. Schill provided further information at the next several meetings they had in September and November 2009.[56] In about November 2009, Haas provided a rough sketch of savings in costs of fuel and labor.[57] By that time, he had a good idea of CSI's labor and insurance costs. Months passed before he had further contact with Schill.

Haas and Schill resumed meeting in 2010 on the subject of All Pro taking over CSI's fleet. They discussed different pricing options and different requirements. In about November 2010, they talked about the different permits that All Pro would need. At the December 13, 2010 meeting they discussed price structures, insurance, and where the savings would be for CSI. Schill continuously asked about cost savings. In Haas' experience, it is not unusual for negotiations about taking over a fleet to go on for a year or more.

During this period, All Pro was not transporting hazardous waste for any companies, and transporting hazardous waste for CSI did not come up in 2009. Haas did not look into it until probably toward the end of 2010, at which time he ascertained that because backhauling hazardous waste required specialized permits and extra insurance, it would be cost ineffective for All Pro. Thus, at the end of December 2010, he told Schill that All Pro could not handle the waste, and discussions broke down concerning All Pro taking over the fleet. All Pro has continued to provide CSI with long-haul drivers to fill in in delivering nonhazardous material.

I credit Schill's testimony as follows. Even prior to the breakdown of those negotiations, Schill explored with CETCO and Thomas Freight of their taking over some or all of the trucking operation.[58] He followed the same process as with Haas. In late December 2010, he reached a verbal agreement with Andy Ilcin of CETCO to take over dry-freight or nonbulk work, with bulk work to continue to be performed by CSI drivers or DistTech drivers. The CSI/CETCO agreement was not reduced to writing until August 1, 2011.[59] Schill testified the delay was the result of both sides needing to make certain that CETCO knew and could perform the functions specified by the agreement, and that CETCO was phased in. At the time of the oral agreement, CETCO lacked the necessary hazardous waste permits for backhauling waste but was in the process of obtaining them and later did.

Schill was not a credible witness as far as his role in negotiations for leasing or purchasing CSI's vehicles. He first testified that he did not handle any such negotiations but merely supplied equipment lists, but he later expanded the scope of his involvement to providing lists and answering questions.[60] Either way, his testimony was contradicted by a series of emails between him and Ilcin from March 24 to April 1, 2011.[61]

[55] Jt. Exh. 15 (also R. Exh. 1). He sent an identical letter, other than dates, upon the subsequent layoffs.

[56] See R. Exh. 14, Haas' daily appointment book.

[57] See R. Exh. 154.

[58] This testimony is corroborated by R. Exh. 45, a letter dated March 16, 2009, from Thomas Transport to Schill and Jones, setting out rate quotes for deliveries to four locations that Schill had identified.

[59] R. Exh. 80.

[60] Tr. 822, 824.

[61] GC Exhs. 25–28.

Schill initiated the email chain with the question, "Would you be interested in leasing our van trailers and if so I have no idea what do you charge?" and in fact discussed terms and conditions with Ilcin over the following week.

Schill was also in communication with John Rakoczy of DistTech in November 2010, as reflected by their exchange of emails on November 11 and 12.[62] Schill first testified that he did not discuss the Union with him.[63] However, that testimony was utterly impeached by the emails. Thus, in the first such email, Rakoczy asked, "Would you be insistent that all of your drivers be assumed if an outsource situation would occur? I am looking at ways to approach the business, while mitigation the union constraints." Schill replied, "Does not have to include our drivers." Rakoczy's next email stated that DistTech would try to get around "the union issue," to which Schill responded, "We do not want union drivers in here."

IV. THE DECISION TO CLOSE THE TRUCKING DIVISION

Schill was evasive when questioned about when he learned a final decision had been made to terminate the trucking division, never giving a definite date or even timeframe.[64] Nonetheless, his testimony contradicted Pavlish's as far as the timing of the final decision, one of the reasons I find that Pavlish was only partially credible.

Bob Debevec, an accountant for CSI, also testified on this matter. He appeared candid and not to be making efforts to slant his testimony in the Company's favor. For example, he carefully delineated his role in preparing documents for CSI and made it clear that CSI rather than he determined certain figures therein. Accordingly, I find his testimony reliable and credit it.

Debevec is the owner and sole owner of Clearpoint Partners, an accounting business. CSI has been one of his clients since August 2005. He primarily assists the Company in closing books on a monthly basis, doing special projects, and communicating information to CSI's outside accountants for preparation of financial statements. He analyzes financial information at the request of CSI's management but does not provide projections.

Respondent's Exhibit 157 contains summaries of trucking costs for the years 2008, 2009, and 2010, which Debevec prepared. He prepares such reports annually, typically in February or March after the end of the year. The document reflects that total trucking costs went down from $1,836,642 in 2008 to $1,512,289 in 2009 and $1,497,076 in 2010.

Respondent's Exhibit 56 is a memorandum that Debevec prepared in April 2009 at the request of Pavlish and Pat Pavlish to analyze the cost of a potential plant reorganization. At the time, Pavlish said that he was contemplating a reorganization to make the plant more efficient but did not elaborate. Pavlish estimated that the reorganization would cost $3 million. Debevec estimated that they could borrow about two-thirds from a bank, with CSI having to finance the balance.

Pavlish's testimony that he made the decision to terminate the trucking division in "probably February 2009"[65] was unreliable. He testified that prior to making the decision to close the trucking division, he reviewed the above documents prepared by Debevec. However, Respondent's Exhibit 56 was prepared in April 2009. Additionally, Schill contradicted Pavlish by testifying that as of late 2010, CSI had still not made a definite decision to subcontract out all of the trucking work; rather, "[T]hat [was] the direction we were headed in . . . ."[66] Their testimony about the conversations they had about needed replacement of vehicles was also inconsistent.

Moreover, Pavlish's testimony that "[w]e always knew we lost money in trucking. . . . I never realized that it was . . . this substantial"[67] struck me as artificial and unbelievable, coming from the sole owner.

I credit Pavlish's unrebutted testimony on the following and so find. In past years, Pavlish closed two other divisions because they were not making money. He anticipated saving about $300,000 a year by terminating the trucking division.

V. THE CURRENT OPERATION

CETCO performs most of the work that drivers used to perform; All Pro and DistTech the balance. These carriers assign and direct contract drivers and provide vehicles with their own logos, which they dispatch to the facility to pick up shipments for delivery. Jones sets up the delivery schedules on the DDM. He normally contacts the contract drivers by going through their company representatives but, if necessary, can communicate directly with them.

By the terms of its agreement with CSI (R. Exh. 80), CETCO is responsible for providing drivers and equipment, including vehicle maintenance and repair, licenses, insurance, workers' compensation, and compliance with government regulations. These were all costs to CSI when it had an in-house trucking division. CETCO initially used CSI equipment, which was later sold to Turn-To and then leased to CETCO. I will say more about this in the section on Turn-To.

I rejected the Respondent's proffered expert witness testimony from William Joquith that after the elimination of the Company's trucking operation, CSI has realized cost savings. His after-the-fact assessment ipso facto could not have played any part in the Company's decision and, in any event, would not serve to insulate the Respondent from any findings that it otherwise committed ULPs. Accordingly, his testimony would not have assisted in deciding the issues herein and was properly excluded. See Federal Rule of Evidence 702.

VI. THE RELATIONSHIP BETWEEN CSI AND TURN-TO

All dates in this section occurred in 2011 unless otherwise indicated.

Pat Pavlish was the primary witness regarding Turn-To and its relationship with CSI. She appeared straightforward and answered questions readily and without any apparent effort to slant her responses. In this regard, I note that she volunteered

[62] See GC Exh. 13.
[63] Tr. 394.
[64] See Tr. 370–372.
[65] Tr. 1201.
[66] Tr. 371.
[67] Tr. 1202.

the information that Pavlish is a 50-percent partner in the corporation that owns the building in which Turn-To leases space. Her testimony was also consistent with that of the Acting General Counsel's witnesses and other evidence of record. Accordingly, I find that she was a reliable witness, and I credit her testimony. Debevec also offered testimony relating to Turn-To vis-à-vis CSI, which testimony I have no reason to doubt. Therefore, I find the following.

Pat Pavlish was first employed by CSI as a buyer in 1982. For the past 10 years, she has been secretary/treasurer and served in an administrative role. She remains a paid employee of CSI, as secretary/treasurer. She has a general oversight responsibility over accounting, but in recent years has not handled day-to-day accounting activities, a role performed by Controller Brian Cahill. She has not had an office at CSI since 1988 and has no desk there. Her interaction with unit drivers was only occasional and casual; she had no supervisory authority over them and played no part in grievance handling.

In late May, she decided to become involved in the formation of Turn-To and used Attorney Colaluca to set up the corporation. Cahill also assisted her in establishing and operating Turn-To and served as a conduit between her and Ilcin in their exchange of documents. Pat Pavlish is its sole owner and handles all of the bookkeeping aspects of the business. It maintains one office, in Euclid, Ohio, where the only equipment is office-related, including a personal computer on which Pat Pavlish conducts all of Turn-To's business. When she is away, the office is closed. Turn-To leases space from E & G, LLC, which owns the building. Pavlish is a 50-percent partner in that company.

Turn-To has had only one employee, Jonathan Brown, a driver, who was hired in September and has never worked for CSI. He performs over-the-road or overnight pickups and deliveries of materials hauled in chemical truck (over-the-road service). Brown comes to the Turn-To office when he need to be in the office but otherwise is on the road all of the time. In contrast, drivers worked out of the plant, making deliveries and returning. Brown hauls chemicals to Turn-To and to other companies through a broker, Dave Sindel of TransChem, who is responsible for dispatching him. Sindel also performs brokering for CSI. Pat Pavlish does not directly do any brokering. Brown's geo-graphical area includes the Chicago, Illinois, Newark, New Jersey, and Philadelphia, Pennsylvania metropolitan areas; and Florida, Tennessee, and Texas. He takes the tractor home with him when it is not being used, and he takes the tankers either home or to the CSI facility. He hauls in chemicals for CSI but does not carry out CSI products.

Turn-To's only other business activity has been selling/leasing vehicles to CETCO. Pat Pavlish set up these arrangements directly with Ilcin of CETCO, without assistance from Schill. Their negotiations began in about October or November. She does not have a leasing arrangement with any other company.

General Counsel's Exhibit 32 is the sale/purchase agreement dated July 25, pursuant to which Turn-To bought vehicles from CSI for just short of $400,000. Pavlish signed for CSI; Pat Pavlish for Turn-To. A payment of $252,000 was due within 60 days, with the balance due in 1 year, with accrued interest at a rate of 5 percent per annum from the date of sale. The shaded areas on pages four and five show which vehicles Turn-To later leased to CETCO. Turn-To paid CSI the $252,000 as per the agreement.[68]

Debevec prepared a portion of Respondent's Exhibit 136, a summary of the vehicles that CSI sold to Turn-To. Thus, he calculated depreciation as of June 30, using the Company's depreciation schedules, but did not determine the selling prices.

Based on the parties' stipulation and Pat Pavlish's testimony, I find as follows. Of the 10 tractors listed in the exhibit, 1 is being used by Turn-To, 6 are owned by Turn-To and leased to CETCO, and 3 were sold, at least 2 to a used-truck broker who has no connection with CSI; that of the 10 box trailers listed, Turn-To uses 1, leases 6 to CETCO, and sold 3 to CETCO; and that of the 8 listed tankers, Turn-To uses 2 and has 6, situated at the CSI facility, that are not in use. The vehicles that CETCO purchased or leased are housed at the CSI facility, were they are loaded at night.

Respondent's Exhibit 79 is the tractor/trailer lease agreement between Turn-To and CETCO, effective August 1. CETCO is responsible for all maintenance, taxes, insurance, licenses, and miscellaneous fees. Turn-To has no written agreement with CSI concerning the housing of its vehicles. There is an agreement between the two companies, dated August 25, whereby CSI may use Turn-To's vehicles, if available, for specified rates.[69]

VII. UNION REQUESTS FOR BARGAINING/INFORMATION

All dates in this section occurred in 2011.

By letter of January 3 to Mixon, Attorney Colaluca notified the Union that CSI would be closing its trucking operation, based on business/economic considerations.[70] He stated that CSI was willing to discuss any alternatives that the Union could offer and that the decision affected only the drivers, not other unit employees.

By letter dated January 19 to Colaluca, Mixon responded that Union did not consent to the action and viewed it as a ULP.[71] He enclosed a class-action grievance, dated January 19, alleging that the announced permanent outsourcing of truck driving work violated various provisions of the collective-bargaining agreement and constituted an unlawful unilateral change. Mixon requested bargaining over the decision and its effects and in 99 paragraphs, requested a wide variety of documents, to be furnished no later than January 29. Mixon prepared the letter after consulting with Attorney Petroff.

I will not address items that the Union later withdrew or for which there is no dispute that CSI provided information. Following are the extant items, and why, Petroff testified, the Union requested them. Unless otherwise specified, the timeframe was since January 2002. "Entity" refers to any entity or person CSI has used to perform drivers' work, as stated in the request.

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[68] See R. Exh. 139.

[69] R. Exh. 138.

[70] Jt. Exh. 10. The parties stipulated that the date January 3, 2010, was an inadvertent error.

[71] Jt. Exh. 11.

1. Documents which formed any part of the basis for the decision to close the trucking operations.
2. Documents related to the decisions to transfer the work and to whom.
3. Documents relating to operating and financial plans during the past 5 years.
4. Documents of any pertinent meetings at which closure was discussed and written communications announcing their results.
5. Documents which had an impact on the decision to close its trucking operation.
6. Financial records for the last 5 years for the Company and its various operations.
7. Financial records for the latest period for the Company and its various operations.
8. Documents showing the volume of orders for trucking operations on a monthly basis.
10. Daily dispatch sheets or assignment sheets.
11. List of all routes and drivers on a monthly basis.
12. An accounting on each route on a monthly basis.
15. Documents showing the amount, date, and type of equipment and machinery used by employees that has been sold or shipped out to other companies.
16. Documents showing all unit work that has been subcontracted and/or relocated out to outside contractors.
17. Documents showing efforts to offer outsourced routes or runs to unit driver and why CSI considered them unavailable to drive.
18. Documents relating to the sale, lease, or other transfer of equipment once used by unit drivers.
19. Documents relating to the actual and/or estimate cost per employee for unit driving work.
20. Definitions of the geographic area of CSI, All Pro, and other entities used in the past 5 years.
22. The business phone numbers and directory listings of All Pro and such other entities.
23. Banking information pertaining to CSI, All Pro, and such other entities.
24. Documentation pertaining to the maintenance of business records of CSI, All Pro, and such other entities.
25. The principal accountant of CSI, All Pro, and such other entities.
26. The license number(s) and other registration numbers of CSI, All Pro, and such other entities.
28. Taxpayer identification, workers compensation, and unemployment numbers for CSI, All Pro, and such other entities.
29. Identification and description of any funds transferred for the past 5 years between CSI and any such entity.
30. Sources and amounts of credit for All Pro or any such other entity.
35. Businesses that use tools or equipment of CSI, All Pro, or any such other entity.
36. Businesses to whom CSI, All Pro, and other entities sell, rent or lease equipment or tools.
37. Businesses from whom CSI, All Pro, and other entities buy, rent, or lease equipment or tools.
38. Equipment transactions for the past 5 years between CSI, All Pro, and other entity.
39. Specific information relative to item 38.
40. D, G, & N—who is performing warehousing, truck driving, and supplies and equipment functions
41. D. G. & N —warehousing, truck driving, and supplies and equipment services provided by All Pro.
42. Customers during the last 5 years of CSI, All Pro, and any other entity.
43. Customers All Pro has referred to SI.
44. Which customers of All Pro are customers of CSI.
45. For such customers, the dollar volume of work performed over the last 5 years for CSI, All Pro, and any other entity.
46. Persons who bid or negotiate work for CSI, All Pro, and any other entity.
47. Customers for which CSI, All Pro, and any other entity have worked together in the last 5 years.
49. Customers for whom work has succeeded by CSI, All Pro, and any other entity.[72]
50. Work performed on the products or jobs of CSI, All Pro, and any other entity.
51. Names and other information regarding employee of CSI, All Pro, and any other entity.
52. Names and other information regarding employees of CSI who have been employees of any entity.
53. Employees transferred between CSI and All Pro and any other entity.
54. The work such employees were performing at the time of transfer.
59. Management personnel of CSI employed by CSI, All Pro, and any other entity.
61. The representative(s) of CSI, All Pro, and any other entity who establish or control labor relations policy.
63. Copies of the articles of incorporation and other corporate documents and financial reports for CSI, All Pro, and any other entity, over the past 5 years.
64. Any document jointly produced or used by CSI, All Pro, and any other entity, concerning wages and conditions of employment, and business operation.
65. A description of the business of CSI, All Pro, and any other entity.
66. Copies of standard independent contractor agreements with drivers and/or owner-operators of CSI, All Pro, and any other entity.
67. Copies of any less than arm's-length-transactions between CSI, All Pro, and any other entity, over the last 5 years.
68. A list and description of all deliveries performed by All Pro.
70. What holiday days will be paid to employees prior to their layoff?

[72] See Tr. 560.

71. Do any unit employees have unpaid claims for bereavement leave?
72. Do any unit employees have unpaid claims for sick leave?
73. Are any unit employees out on jury duty?
74. Employees who have earned but not used vacation leave, and will they receive accrued vacation pay?
75. List of employees presently on leave of absence.
76. List of employees who have any unpaid back pay compensation (related to the findings of another agency).
78. List of employees on layoff, with various information, including whether they are receiving any benefits.
79. A list of unit employees presently contesting discipline.
80. A list of the unit employees presently on workers compensation.
81. A list of employees who have unpaid life insurance claims.
86. Oral or written side agreements between CSI and unit employees.
90. All job postings and the names of unit employees who refused a job or did not prove satisfactory in doing the job.
98. Contractual language, proposals, and other information supporting CSI's position that is privileged to contract out the work or that CSI intends to use at arbitration.
99. Other documents relating to the changes in question upon which management relied in denying the class-action grievance.

Below are the reasons Petroff testified that the Union requested the above information.

Items 1–6—to enable the Union to bargain over the decision to terminate the trucking operation and its effects, and to demonstrate that the decision was based on retaliatory motives.

7–12—to allow the Union to bargain over the decision to outsource, with 8 also relating to the class action grievance.

15—to bargain over the decision to subcontract.

16–20—to assist in the investigation of the class action grievance and to bargain over the outsourcing decision.

22–30—to establish the relationship that the Respondent had with the outsourcing employers and to determine whether the subcontractors' employees were arguably in the bargaining unit.

35—to assist in the investigation of the class action grievance and to show a retaliatory motive for the Respondent's decision to outsource the work.

36–39—to process the class action grievance and to show the relationship between the Respondent and any subcontractors.

40 D, G and N—to bargain over the Respondent's decision to subcontract.

41 D, G, and N—to assist in the investigation of the class-action grievance.

42–45—to investigate the grievances and to determine whether bargaining unit work was being performed by others.

46–47—to show the relationship between the Respondent and its subcontractors.

49–50—to investigate the class action grievance and to prove damages related to the unlawful outsourcing of bargaining unit work.

51—to bargain over the decision to subcontract and to determine the number of non-bargaining unit employees used to perform bargaining unit work.

52–54—to show the relationship between the Respondent and its subcontractors who were performing bargaining unit work

59, 63, and 64—to investigate whether the Respondent and its subcontractors were single and/or joint employers.

65—to bargain over the decision to contract and to ensure that the subcontractors maintained the proper permits to perform bargaining unit work.

66—to investigate the grievance and to bargain over the Respondent's decision to subcontract.

67–68—to determine the relationship between the Respondent and its subcontractors, and to process the class action grievance.

70–81, 86—to engage in effects bargaining relative to holiday pay, vacation pay and bereavement, union dues payments, wages, workers' compensation, lay off, and overtime.

90—to negotiate over the decision to subcontract and to resolve the class-action grievances.

98—to negotiate the decision to subcontract, to obtain information about bargaining unit work, to process the class action grievances and to determine whether ULP charges should be filed.

99—to assist in the processing of the class-action grievance.

By letter of January 25 from Colaluca to Mixon, the former stated that the request for information was overbroad and in most cases irrelevant.[73] He offered to provide information as to the effects of the layoffs of the bargaining unit, e.g., severance pay and retirement benefits, by February 4. He further stated that the Company was prepared to meet regarding effects, suggesting several dates. I accept Colaluca's testimony that his including the dates of January 24 and 25 was an inadvertent error and not reflective of malicious intent. Finally, Colaluca denied the class-action grievance over the subcontracting on the basis that the labor agreement authorized the Company's conduct.

Attorneys Colaluca and Petroff had a lunch meeting on about January 27. Colaluca stated that he considered the Company's subcontracting to be a nonmandatory subject, to which Petroff responded that he disagreed with Colaluca's legal interpretation. Petroff testified that Colaluca indicated that the Company would not bargain over the decision to close the trucking operation. Colaluca denied saying that the Company was unwilling to discuss the subject of subcontracting. Their testimony is not necessarily inconsistent. No bargaining over the decision to subcontract or its effects has ever occurred. The Union never proposed any alternatives.

By letter of January 28 to Colaluca, Petroff disputed statements that Colaluca made in his January 25 letter about the information request, and asked for more specific responses.[74] In

[73] Jt. Exh. 12.
[74] Jt. Exh. 13.

addition to those documents, Petroff requested other information pertaining to the decision to outsource, set out in 17 paragraphs. He reiterated the Union's request to bargain over the decision and its effects and to take the class-action grievance to a second-step hearing under the contractual grievance procedure. The letter referenced a January 28 letter from Mixon, but it is not in the record.

By letter of January 31 to Petroff, Colaluca stated that they had a major disagreement over whether the labor agreement permitted CSI to transfer work and that CSI's position was that since the contract expressly permitted such, it was under no obligation to engage in bargaining over the decision or to provide any information regarding such decision.[75] He asked if Petroff's reference to a second-step hearing was a request to proceed to arbitration.

By letter of February 4, Colaluca emailed Mixon nine attachments responsive to the Union's January 19 information request insofar as it pertained to the effects of the decision to subcontract or to lay off unit employees.[76] He stated that some of the requests asked for lists that CSI did not maintain, information that CSI did not have, or information that was within the Union's possession. He went on to say that the information being provided were responsive to items 9, 13 and 14, 21, 27, 55, 60 and 61, 70–85, 87–89, and 91–97.

With a hand-delivered letter of March 10, Colaluca provided Petroff with the same information in flash-drive form because there was a question of whether all of it had been received through the earlier email.[77]

The Company never provided any information in response to the Union's January 28 request. The parties stipulated that Respondent's Exhibit 123 contains all of the information that the Respondent furnished to the Union regarding subcontracting and health insurance.

The Acting General Counsel concedes that the Respondent provided some of the information relating to effects bargaining but avers that as far as effects bargaining, the Respondent violated Section 8(a)(5) by not providing information responsive or fully responsive to items 1–6, 70–76, and 78–81 (Br. 44–45). Paragraphs 1–6, on their face, related to the decision to subcontract, despite Petroff's testimony. As to the other paragraphs, the Acting General Counsel points to the Respondent's failure to furnish information relating to holiday pay, bereavement leave, sick leave, jury duty, vacation, leave of absence, unpaid compensation, workers' compensation, and unpaid life insurance claims. Such information is not contained in Respondent's Exhibit 123.

At trial, I reviewed certain documents proffered by the Respondent and rejected them under Federal Rule of Evidence 408, concluding that they constituted efforts by the Union and the Company to settle the outstanding ULPs and related grievances, and their introduction would serve no other purposes. Promoting settlement is a strong public policy engrained throughout our entire legal system, and great care must be taken to avoid discouraging parties from engaging in attempts to resolve disputes between themselves and without the need for litigation. Accordingly, I have not considered those documents.

[75] Jt. Exh. 14.
[76] Jt. Exh. 16.
[77] GC Exh. 18.

Analysis and Conclusions

The 8(a)(1) Allegations

In 8(a)(1) cases, the Board's task is to determine how a reasonable employee would interpret the employer's action or statement and whether the conduct would reasonably tend to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights, taking into account the surrounding circumstances. *Roomstore,* 357 NLRB No. 143, slip op. at 1 fn. 2 (2011); *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646 (2004).

I. DID SCHILL, ON OCTOBER 27, 2010, THREATEN GRIFFITH WITH UNSPECIFIED REPRISALS BECAUSE HE ENGAGED IN UNION/PROTECTED ACTIVITY?

Griffith, who initiated the meeting, accused management of singling out and harassing him and two other drivers by calling only them in for "training" sessions. Schill responded that Griffith was starting to "piss [him] off" and that the Respondent was starting to regret rehiring him in 2007. Griffith asked why Schill had made those comments, to which Schill did not reply.

The question here is whether Griffith would reasonably have construed Schill's remarks as a veiled threat of reprisal because he had engaged in union/protected activity in 2007 (he did not file a grievance in 2010 until after the October 27 meeting). I also take into account the Respondent's argument (Br. at 74) that such activity was remote in time vis-à-vis the conversation. On the other hand, I have to consider that Griffith suffered discharge from employment as a result of the 2007 work stoppage, that Schill sua sponte raised what had occurred, and that Schill expressed animosity and regret at rehiring him in 2007 in the same breath. In my view, this conveyed the implicit message that Griffith's prior activity could be resurrected as a basis for further actions against him.

The legality of Griffith's discharge in 2007 was never litigated, since the ULP charge concerning it was withdrawn after he was reinstated, nor was the issue of whether the work stoppage itself violated either the law or the collective-bargaining agreement. Accordingly, there is no way to assess after-the-fact whether any union activity in which he engaged in connection with the work stoppage was in fact protected or unprotected. Nonetheless, Schill's statement could reasonably have been construed to refer to Griffith's status as a union steward in 2007, which most certainly was protected activity, regardless of the status of the work stoppage. To the extent that Schill's statement was ambiguous, Griffith could reasonably have construed the threat as relating, at least in part, to his protected union activity. See *Ellison Media Co.,* 344 NLRB 1112, 1114 fn. 5 (2005); *Armstrong Machine Co.,* 343 NLRB 1149, 1152 (2004).

Accordingly, I conclude that the implicit threat of unspecified reprisals was on account of protected activity in which Griffith had engaged in 2007, to wit, his status as a union steward, and that it therefore violated Section 8(a)(1).

II. DID SCHILL, ON OCTOBER 27 AND 29, 2010, RESPECTIVELY, THREATEN DRIVERS GRIFFITH AND ZEMAITIS WITH DISCIPLINE IF THEY VIOLATED COMPANY POLICIES REGARDING DRIVERS' PRETRIP INSPECTION OF TRUCKS AND CELL PHONES, IN RETALIATION FOR THEIR UNION/PROTECTED ACTIVITY?

Schill admittedly told both Griffith and Zemaitis that they could be disciplined for failing to comply with the above policies. The key question is whether Schill's statements would have caused Griffith and Zemaitis to reasonably believe that they resulted, in whole or part, from their union/protected activity.

As noted above, at the October 27, 2010 meeting, Schill raised Griffith's 2007 rehire and, indirectly, Griffith's prior status as a steward, in connection with an implied threat of termination. In this context, Schill's warning Griffith for the first time that he would be disciplined for violating those policies would reasonably have led Griffith to believe that the threat related, at least in part, to his protected status as a former union steward.

Accordingly, I conclude that Schill violated Section 8(a)(1) by warning Griffith that he would be disciplined for violating company rules regarding cell phone use and preinspections, because of Griffith's union/protected activity.

Prior to the October 29, 2010 meeting, Zemaitis had filed a grievance over use of outside carriers. However, in contrast to Griffith's October 27 meeting, nothing that Schill said at the meeting with Zemaitis either directly or indirectly had any connection with the Union or Zemaitis' union/protected activity. I do not believe that Zemaitis would have had a reasonable belief that Schill's threats related thereto. I will later address the verbal warning he received regarding a pretrip inspection.

Therefore, I recommend dismissal of this allegation.

III. DID SCHILL, ON NOVEMBER 8, 2010, THREATEN ZEMAITIS WITH DISCHARGE BECAUSE HE HAD ENGAGED IN UNION/PROTECTED ACTIVITY?

This allegation concerns statements that Schill made at a meeting over the grievance Zemaitis had filed on November 2, alleging Schill had created a hostile work environment. As earlier noted, Zemaitis' testimony about why he filed that grievance was shifting. In any event, Schill made the statement that Zemaitis was "on a very thin rope" and "about to lose [his] job" immediately after Zemaitis complained about Schill hanging up on him that morning when he called to have a customer told that he was running later, and Schill's shoving him in the lunchroom 2 weeks earlier. Thus, Schill's remarks were clearly in the context of conduct having nothing to do with the Union or Zemaitis' protected activity of filing grievances on October 4 or November 2. Ergo, I fail to see a nexus between the threat and Zemaitis' protected activity.

Therefore, I recommend dismissal of this allegation.

IV. DID SCHILL, ON NOVEMBER 8 AND 9, 2010, RESPECTIVELY, SOLICIT GRIFFITH AND ZEMAITIS TO RESIGN AND OFFER THEM MONEY TO RESIGN, IMPLIEDLY THREATENING DISCHARGE, BECAUSE THEY HAD ENGAGED IN UNION/PROTECTED ACTIVITY?

I credit Griffith and Zemaitis that Schill solicited them to resign and offered them money to resign. The issue is whether that related to union/protected activity.

As to Griffith, Schill made the statements shortly after a heated first-step grievance meeting. Schill began by saying that he had talked to Pavlish. They thought it would be in his best interest to look for other employment and were willing to offer him some money "just to walk away." Griffith asked why. Schill replied, because he knew some things. Griffith asked if they had an issue with his work or abilities, and Schill answered no. Griffith asked, why then? Schill did not respond.

Thus, Schill's explanation of why management wanted Griffith was ambiguous and did not state a cogent valid reason. In fact, Schill denied that it had anything to do with Griffith's work or abilities. Accordingly, Griffith could reasonably have concluded that it related, at least in part, to his union or other protected activity, i.e., his filing of a grievance and/or his prior status as a union steward, particularly in light of Schill's prior threat on October 27. See *Ellison Media Co.,* above; *Armtrong Machine Co.,* above.

As to Zemaitis, Schill made his statements soliciting Zemaitis to resign and offering him money to do so, because of his "lies and false accusations" at the previous day's grievance meeting. These apparently related to Zemaitis' accusations concerning Schill hanging up on him and shoving him in the lunchroom—conduct wholly unrelated to protected activity. Nevertheless, Schill directly referred to what was stated during the course of the meeting on Zemaitis' grievance over Schill's creating a hostile work environment. Thus, Schill's statements were ambiguous insofar as they could reasonably have led Zemaitis to believe that they resulted, at least in part, from his protected activity of filing a grievance. See *Ellison Media Co.,* above; *Armtrong Machine Co.,* above.

The Respondent contends (Br. at 55, et seq.) that the November 2 grievance was, along with others alleging a hostile work environment, filed for the purpose of harassment and therefore did not enjoy protected status, citing *Exxon Mobil Corp.,* 343 NLRB 287 (2004), revd. 432 F.3d 715 (7th Cir. 2005), and *Caterpillar Tractor Co.,* 242 NLRB 523 (1979). Both cases are distinguishable. Although the administrative law judge in *Caterpillar* cited the above precept, she, inter alia, found protected an employee who filed numerous repetitive grievances over a 2-1/2-month period and did not dismiss any allegations on the basis that the grievances were unprotected. In *Exxon Mobil,* the Board found that a grievance filed by a steward was merely subterfuge for circulating a confidential report and timed to affect a decertification petition, clearly illegitimate ends.

Filing a grievance under the grievance-arbitration provision of a collective-bargaining agreement is an indispensable element of represented employees' rights and only in exceptional circumstances should be considered to have lost its normal protection. That Zemaitis' grievance was vague as to what provisions of the contract were allegedly violated, the language of the grievance was suggested by the Union, the grievance may have lacked merit, or the Union did not take the grievance to arbitration are insufficient reasons, in the absence of other factors showing bad faith, to strip an employee of his or her right to seek redress through the contractual grievance procedure.

Accordingly, I conclude that Schill violated Section 8(a)(1) by soliciting Griffith and Zemaitis to resign and offering them money to resign—an implied threat of discharge—because they had engaged in union/protected activity.

V. DID MITCHELL, ON ABOUT APRIL 15, 2011, AND LATER IN APRIL, THREATEN SHOP EMPLOYEES WITH LAYOFF AND/OR DISCHARGE IF THEY FILED GRIEVANCES UNDER THE COLLECTIVE-BARGAINING AGREEMENT?

On two or three occasions in April 2011, Mitchell told shop employees in groups that if they filed grievances, they would end up like the drivers (who were in the process of being replaced by contract drivers). Since the standard for finding a statement coercive is an objective one and not based on the speaker's intent or state of mind, the fact that Mitchell might have made those statements in jest is irrelevant.

Accordingly, I conclude that Mitchell violated Section 8(a)(1) by threatening production employees with layoff and/or discharge if they filed grievances under the collective-bargaining agreement.

VI. DID MITCHELL, ON ABOUT APRIL 13 OR 14, THREATEN HREHA WITH UNSPECIFIED REPRISALS BECAUSE HE HAD ENGAGED IN PROTECTED ACTIVITY BY ADVISING SUBCONTRACTORS' DRIVERS OF THE SAFETY ISSUES INVOLVED IN HANDLING HAZARDOUS MATERIALS?

In this conversation, Mitchell accused Hreha of having a bad attitude and told him not to talk to a new drivers they were hiring. Hreha denied having a bad attitude, stating that he was merely alerting new drivers of safety concerns when dealing with hazardous chemicals. Mitchell told him not to talk to them and not to let the subcontracting fail. When Hreha explained some of the safety concerns and said that he was not trying to scare them, Mitchell responded that he now understood, and he apologized.

I fail to see any threats, of unspecified reprisals or otherwise, in what Mitchell told Hreha. In any event, after Hreha explained his safety concerns, Mitchell immediately retracted what he had said. The subject was never again mentioned between them.

In light of the above circumstances, I find no merit to this allegation and recommend its dismissal.

Zemaitis' November 11, 2010 Verbal Warning as an 8(a)(3) Violation

All dates in this section occurred in 2010.

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus. In more recent decisions, the Board has essentially construed the last element as requiring only an adverse employment action, specifically rejecting the construction that the General Counsel must establish a link or nexus between the protected activity and the employer's action. See *Prexair Distribution, Inc.,* 357 NLRB No. 91, slip op. at 1 fn. 2 (2011); see also *Gelita USA Inc.,* 352 NLRB 406, 406 fn. 2 (2008).

Under the *Wright Line* framework, if the General Counsel makes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam).

To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. As the Board stated in *Rood Trucking Co.*, 342 NLRB 895, 898 (2004):

> A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where "the evidence establishes that the reasons given for the Respondent's actions are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

See also SFO *Good-Nite Inn, LLC,* 352 NLRB 268, 269 (2008). On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the

employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

Here, Zemaitis filed two grievances prior to November 11, one on October 4 relating indirectly to use of outside carriers; the other on November 2, concerning Schill's statements at the October 29 training meeting. A grievance meeting on the latter took place on November 8, and on November 9, Schill threatened Zemaitis with termination and offered him money to quit because of his "lies and false accusations" at the previous day's grievance meeting. On November 11, Schill issued Zemaitis a verbal warning for not having properly conducted a pretrip inspection on November 9. Based on these facts, I conclude that the Acting General Counsel has established a prima facie case under *Wright Line*.

I note with respect to animus that the timing of the issuance of the warning—just 3 days after the grievance meeting and 2 days after Schill threatened Zemaitis with discharge—further supports reliable and competent evidence of unlawful motivation. See *Davey Roofing, Inc.,* 341 NLRB 222, 223 (2004); *Power Equipment Co.,* 330 NLRB 70, 74 (1999).

Based on the following, I conclude that the Respondent's proffered defense was a pretext. Schill testified that the main concern of pretrip inspection, properly securing a load, is safety and that if a violation is observed, it is dealt with immediately. Despite this contention, he further testified that he observed Zemaitis drive away on November 9 without having properly performed a pretrip inspection but admittedly did not stop him from leaving the facility at the time. Indeed, Schill testified that it did not even occur to him to call Zemaitis immediately as soon as he drove off but instead allowed him to depart and enter the public streets and highways, wholly undercutting Schill's testimony that what Zemaitis allegedly did constituted a serious safety issue justifying a warning. Further, Schill offered no explanation of why he waited 2 days to bring the incident to Zemaitis' attention.

Significantly, prior to October 2010, no driver was ever disciplined for not properly conducting a pretrip inspection. The one documented incident that the Respondent has provided involved driver Haught, who was disciplined in July 2005 after the Ohio PUC levied a fine of over $1600 because he was found to have a mislabeled and unsecured drum at a weight station. That incident was certainly far more serious than what occurred on November 9 and cannot be considered analogous. Therefore, I cannot deem it as an example of similar discipline being imposed in the past.

In view of the above, I find that the proffered reason for Zemaitis' warning was a mere pretext and that antiunion animus motivated the Respondent's action: retaliation against him because he had filed grievances under the collective-bargaining agreement. Accordingly, no further analysis of the Respondent's defenses is necessary.

Accordingly, I conclude that the Respondent violated Section 8(a)(3) and (1) when it issued a verbal warning to Zemaitis on November 11, 2010.

Closing of the Trucking Division

It is undisputed that prior to November 2010, consistent with the language of the labor agreement, the Respondent used contract drivers to perform bargaining unit work in certain circumstances, such as when honoring customer requests, unit drivers were unavailable or approaching their maximum legal hours, or on as-needed basis. However, this use of subcontractors was not the same as the Respondent's phasing out of the entire trucking division and, concomitantly, replacing all unit drivers with contract drivers.

As articulated in *Bob's Big Boy Family Restaurants,* 264 NRB 1369, 1370 (1982), a legal distinction is made between classic subcontracting and partial closing. Briefly put, an employer's decision to contract out bargaining unit work is a mandatory subject of bargaining and triggers the obligation to bargain over both decision and effects. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 210–212 (1964); *O.G.S. Technologies, Inc.,* 356 NLRB No. 92 (2011); *Torrington Industries,* 307 NLRB 809 (1992). On the other hand, an employer's decision to terminate all or a portion of its business is not a mandatory subject of bargaining. *Textile Workers v. Darlington Mfg. Co.,* 380 U.S. 263, 267, 274–275 (1965); *Lenz & Riecker,* 340 NLRB 143, 144 (2003).

As the Board stated in *Bob's Big Boy Family Restaurants:*

> The distinction between subcontracting and partial closing . . . is not always readily apparent. Thus, it is incumbent on the Board to review the particular facts presented in each case to determine whether the employer's involves an aspect of the employer/employee relationship that is amenable to resolution through bargaining with the union since it involves issues "particularly suitable for resolution within the collective bargaining framework." If so, Respondent will be required to bargain over its decision. If, however, the employer action is one that is not suitable for resolution through collective bargaining because it represents "a significant change in operations," or a decision lying "at the very core of entrepreneurial control," the decision will not fall within the scope of the employer's mandatory bargaining obligation. [264 NLRB at 1370, footnotes omitted.]

Factors to be examined are the nature of the employer's business before and after the action taken, the extent of capital expenditures, the bases for the action, and, in general, the ability of the union to engage in meaningful bargaining in view of the employer's situation and objectives. Id.

In *Bob's Big Boy Family Restaurants*, above, the Board, in finding that the employer had subcontracted certain work (shrimp processing) rather than engaged in a partial closing, noted at the outset that:

> [The] Respondent did not engage in what can be objectively termed a major shift in the direction of the Company. Both before and after the subcontract, Respondent engaged in the business of providing prepared foodstuffs to its various stores. Indeed, it appears that *Respondent still supplies process shrimp to its constituent restaurants*. The only difference is that the processing work is now pre-

> formed by Fishking employees pursuant to the subcontract rather than by Respondent's employees. Accordingly, the nature and direction of Respondent's business was not substantially altered by the subcontract. [Id., footnotes omitted.]

Secondly, the Board noted that when the subcontracting arrangement became operative, the respondent was not required to engage in any substantial capital restructuring or investment, that the plant area devoted to shrimp processing remained part of the respondent's facility, and that the respondent retained substantial ownership of the equipment that had been used in shrimp processing. Id.

Finally, the Board concluded that a review of the respondent's objectives in subcontracting the shrimp processing revealed that the respondent's concerns (escalating costs and portion control) were "of the type traditionally suitable for resolution through the collective-bargaining process." Id. [footnote omitted]. The Board stated:

> As the Court noted in *Fibreboard*, production cost matters, which by their very nature include wages, fringe benefits, and other employment costs, over which the union can exercise substantial control, are "particularly suitable for resolution within the collective bargaining framework . . . . [Id., footnote omitted.]

In *O.G.S. Technologies, Inc.,* supra, the Board engaged in a similar analysis in concluding that the respondent's termination of a portion of its operation constituted subcontracting that required bargaining over both the decision and its effects.

Consistent with this approach, the Sixth Circuit Court of Appeals in *Calatrello v. Automatic Sprinkler Corp. of America,* 55 F.3d 208, 213 (6th Cir. 1995), citing *Fibreboard,* above, found that the Board had produced sufficient evidence that the company's subcontracting decision was a mandatory subject of bargaining because (i) the company in effect substituted the subcontractors' employees for its own, (ii) the Company continued to engage in the same line of business; and (iii) the local unions had substantial control or authority over the basis for the company's subcontracting decision, i.e., labor costs.

Here, CSI sold all of its vehicles (other than two automobiles) to Turn-To, which still owns 7 of the 10 tractors, 7 of the 10 box trailers, and all of the 8 tankers. Significantly, six of these tankers, which are not in use, are housed at the CSI facility, and there is no evidence of any contract between CSI and Turn-To regarding this.

Although Pavlish testified that he was planning a restructuring of his entire operation and putting significantly more money into his mixing division, no evidence was introduced to show any such investment at or around the time that the trucking division was closed. Nor is there any evidence that the company changed the nature of its business, that its customer base changed, or that carriers' drivers now perform work that was different than that performed by CSI's drivers.

I do credit Pavlish to the extent that I believe the motive behind closing the trucking operation was financial, rather than based on antiunion animus. I will discuss this further below. The fact that Pavlish decided to terminate the trucking operation because of costs does, on the other hand, buttress the conclusion that the Respondent had an obligation to engage in bargaining over the decision itself, as per the Board decisions and court cases cited above.

The next issue is whether the Respondent is correct in arguing that the management-rights language in article II, paragraph 1 constituted a waiver of the Union's right to bargain over termination of the trucking operation and the layoffs of all unit drivers.

Waiver of statutory lights is not to be lightly inferred but instead must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983); *Federal Compress & Warehouse Co. v. NLRB,* 398 F.2d 631, 636 (6th Cir. 1968); *Quality Roofing Supply Co.,* 357 No. 75 (2011); *General Electric Co.,* 296 NLRB 844, 844 (1989). Proof of contractual waiver is an affirmative defense, and it is the respondent's burden to show that the contractual waiver is explicitly stated, clear, and unmistakable. *Metropolitan Edison Co.,* supra at 708; *AlliedSignal Aerospace,* 330 NLRB 1216, 1228 (2000), review denied sub nom. *Honeywell International, Inc.,* 253 F.3d 125 (2001).

To meet this standard, the contract language must be specific, or it must be shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived it rights consciously yield its interest in the matter. *Allison Corp.,* 330 NLRB 1363, 1365 (2000); *Trojan Yacht,* 319 NLRB 741, 742 (1995). As to the former, the Board looks to the precise wording of the relevant contract provisions. *Allison Corp.,* ibid; *KIRO, Inc.,* 317 NLRB 1325, 1327 (1995).

In other words, waivers can occur by express provision in the collective-bargaining agreement, by conduct of the parties (including past practices, bargaining history, and action or inaction), or by a combination of the two. *American Diamond Tool, Inc.,* 306 NLRB 570, 570 (1993).

In terms of the Union's conduct, nothing in the bargaining history or the Union's actions in and after November 2010 demonstrates waiver. Indeed, the Union unsuccessfully attempted in 2007 negotiations to insert a provision prohibiting subcontracting. The record does not reflect any discussions during negotiations about complete closure of the trucking division. Therefore, I do not deem the Union's proposal on subcontracting, its rejection by the Respondent, and its subsequent withdrawal by the Union, or anything else that occurred in the 2007 negotiations, to amount to a waiver by the Union of bargaining over subcontracting of the entire trucking operation. Nor do I deem the Respondent's limited use of outside drivers to perform unit work prior to 2009 to be a past practice relevant to the waiver issue, since the subcontracting of some unit work is not equivalent to closing the trucking operation and laying off all unit employees.

The pertinent language in the labor agreement is a different matter. Thus, the management-rights clause specifically and unambiguously provide that CSI has the right to *"transfer any or all of its . . . . work . . . to any other entity"* and to *"[t]erminate or eliminate all or any part of its work or facilities"* (emphasis added). This language is akin to language that

the Board found to be a waiver in *Allison Corp.,* supra at 1365 ("[T]he management-rights clause specifically, precisely, and plainly grants the Respondent the right 'to subcontract' without restriction."). Indeed, it is difficult to imagine parlance that could be any broader as far as granting the Respondent the right under the contract to close a particular operation.

This differs from a situation in which the management right might reasonably be inferred from the clause but is not supported by clear and unmistakable language. See, e.g., *Owens-Brockway Plastics Products,* 311 NLRB 519, 525 (1993). *Reece Corp.,* 294 NLRB 448, 452 (1989), which the Acting General Counsel cites (Br. at 26), is distinguishable. In that case, the management-rights clause referred to permanent closure but did not address the conduct in which the employer engaged, to wit, transfer of production and equipment to another company facility. Here, in contrast, express contractual language covers the Respondent's actions.

Accordingly, I conclude that the Union waived the right to engage in bargaining over the decision to terminate the trucking division, and recommend dismissal of the allegation that the Respondent violated Section 8(a)(5) by failing and refusing to bargain there over.

I now turn to the Respondent's obligation to engage in bargaining over the effects of the decision. The parties' briefs focus on the issue of bargaining over the decision and do not specifically address effects bargaining as a separate issue.

As distinct from bargaining over a decision itself, effects bargaining is intended to provide a union with an opportunity to bargain in the employees' interest for such benefits as severance pay, payments into pension funds, preferential hiring, reference letters, health insurance, and retraining funds. *Naperville Jeep/Dodge,* 357 NLRB No. 183, slip op. at 6 fn. 8 (2012); *Allison Corp.,* 330 NLRB 1363, 1370 fn. 14 (2000); *Yorke v. NLRB,* 709 F.2d 1138, 1143 (1973), cert. denied 465 U.S. 1023 (1984).

When the management-rights clause allows the employer to make unilateral transfers of work from one plant to another but is silent with respect to the duty to bargain over the effects, it must bargain over the latter. *NLRB v. Challenge-Cook Bros. of Ohio, Inc.,* 843 F.2d 230, 233 (6th Cir. 1988); *Allison Corp.,* above at 1366. The Respondent has never contended to the contrary, and correspondence between the parties demonstrates its willingness to engage in effects bargaining. The Union appears to have concentrated on what it viewed as the Respondent's obligation to engage in bargaining over the decision and its effects together rather than attempt to negotiate separately over the effects. Leaving aside the issue of whether the Respondent failed to provide requested information relevant to effects bargaining, discussed hereinafter, I cannot conclude that the Respondent failed and refused to bargain over the effects of the decision to terminate the trucking division.

The Layoffs of Drivers as an 8(a)(3) Violation

I set out earlier the *Wright Line* framework used to analyze alleged violations of Section 8(a)(3).

The Acting General Counsel avers that the replacement of the drivers starting on November 5, 2010, was motivated by their filing of grievances and by Mixon's statements about a possible strike. The Acting General Counsel does not specify which grievances, but three were filed in 2010 prior to November 5: Zemaitis' October 4 grievance over his hours, and Zemaitis' and Griffith's November 2 grievances over their training sessions with Schill. Mixon made statements about a possible strike at a meeting with employees on July 30 and at the August 5 and November 1 meetings with management over health insurance.

The filing of grievances under a collective-bargaining agreement is undoubtedly a protected activity, as the Supreme Court observed in *NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 836 (1984). See also *OPW Fueling Components v. NLRB,* 443 F.3d 490, 496 (6th Cir. 2006); *Roadmaster Corp.,* 288 NLRB 1195, 1197 (1988). Further, since Mixon was acting as a bargaining agent of the unit employees, his conduct can appropriately be considered to have derived from their exercise of their Section 7 right to representation.

The Respondent clearly had knowledge of these activities, and thus the Acting General Counsel has shown their occurrence and employer knowledge.

Animus is the next element. I have found that the Respondent threatened Griffith and Zemaitis at least in part because of their union/protected activity, threatened shop employees with being laid off if they filed grievances as the drivers had, and issued a verbal warning to Zemaitis in violation of Section 8(a)(3). These actions demonstrated animus. Schill's email stating that "[w]e do not want union drivers in here" referred to DistTech drivers who might be replacing CSI drivers and not necessarily to the latter, but I will consider it as further evidence of animus.

The Acting General Counsel avers a pattern of CSI's anti-union animus from the start of the collective-bargaining relationship in 1997 (Br. 11–12) but cites only a single case, *Chemical Solvents, Inc.,* 331 NLRB 706 (2000), which the administrative law judge heard in March 1998. I find such ULPs too remote in time to be considered probative. The Acting General Counsel also points to the unrebutted testimony of Griffith that Pavlish and his son, John, expressed anger at the 2007 work stoppage. However, the legality or illegality of that work stoppage was never adjudicated. Accordingly, I do not rely on any history of animus in concluding that sufficient animus has been shown for purposes of showing a prima facie case.

The final element needed to establish a prima facie case is that the Respondent took action because of the animus. That the Respondent laid off all of the unit drivers starting in February 2011 is undisputed.

Having found that the Acting General Counsel has made out a prima facie case, I turn to the second prong of *Wright Line* and whether the Respondent has met its burden of persuasion of demonstrating that the same action would have taken place even in the absence of the protected conduct. The following factors cause me to answer that it has. I emphasize that the credited testimony of Haas and Debevec has played a substantial part in this determination.

The drivers constituted less than 20 percent of the unit, and the Respondent continues to have approximately 40 employees (production and maintenance) represented by the Union.

Moreover, the Respondent offered the drivers positions as production employees in lieu of layoff, albeit at a lower remuneration.

The Respondent in November 2009 first experimented with using contract drivers in place of drivers and, indeed, Pavlish told drivers at that time that he was "testing the waters" as far as utilizing contract drivers to perform unit work. The record further reflects that starting in 2009, the Respondent engaged in ongoing discussions with several contract carriers concerning contracting out such work and closing the trucking division.

Neither the protected activities nor their timing support the Acting General Counsel's contention that the closing of the trucking operation related to the drivers' filing of grievances, or strike threats, to wit, Mixon's remarks at a meeting of drivers on healthcare on July 30 and at two meetings with management, on August 5 and November 1.

Of the three grievances filed in 2010 prior to November 5, Zemaitis filed two, and Griffith one. Two on their face were specific to the employee and without ramifications for the drivers in general. The October 4 grievance concerning Zemaitis' hours of work preceded the phase-out of drivers by a month. As to pre-2010 grievances over use of carriers, only one was filed in March 2009. No grievance was filed over the use of All Pro in November 2009. No grievances filed before September 2010 ever went to arbitration.

As to strike threats, it is true that Attorney Colaluca expressed the Respondent's dismay that Mixon had mentioned a strike possibility at his meeting with employees on July 30 and that the Respondent's use of contract drivers on a regular basis began on November 5, only a few days after Mixon's last statement about a strike. However, in neither of his two conversations with management on the subject of a strike did Mixon say that there would be one or even that one was likely. Rather, on the first occasion, he explained that he had told employees that there could be a strike, depending on what happened over negotiations over health insurance benefits, in an apparent effort to allay the Respondent's concerns. In the second conversation, he merely opined that the employees had a right to strike because the Respondent had violated the contract. No employees engaged in any kind of strike or work stoppage after 2007, and there is no evidence that any employees threatened or even mentioned such actions to management at any time in 2010.

In view of the above factors, I find it incredulous that the filing of the grievances or Mixon's statements about strikes motivated Pavlish's decision to terminate the trucking division, after its 40 years or so existence, 13 of them as a unionized operation. Such a reaction would hardly have been reasonable, and nothing on the record leads me to believe that Pavlish would have had such an overblown reaction to the grievances and/or statements that he would have been more eager to retaliate against the drivers than in doing what was financially best for his company.

In all of these circumstances, I conclude that the Respondent has rebutted the Acting General Counsel's case by evidence showing that it would have terminated the trucking division and laid off drivers for bona fide business purposes even absent the employees' protected activities. See *Palace Sports & Entertainment, Inc.*, above.

Therefore, I recommend dismissal of this allegation.

Failure to Furnish Information About the Closing of the Trucking Division

An employer is obliged to supply information requested by a collective-bargaining representative that is necessary and relevant to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). To trigger this obligation, the requested information need only be potentially relevant to the issues for which it is sought. *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

In analyzing relevance, requested information that relates directly to represented employees' terms and conditions of employment is presumptively relevant. *Beverly Health & Rehabilitation Services,* 328 NLRB 885, 888 (1999); *Samaritan Medical Center,* 319 NLRB 392, 397 (1995). Since a bargaining representative's responsibilities include the administration of the collective-bargaining agreement and the processing and evaluating of grievances there under, information requests pertinent to a union's decision to file or process grievances are presumptively relevant, and an employer is obliged to provide information that is requested for the handling of grievances. *Acme Industrial*, supra at 436; *Beth Abraham Health Services,* 332 NLRB 1234, 1234 (2000); *Safeway Stores*, 236 NLRB 1126 fn. 1 (1978).

In determining whether such a burden has been met at the trial level, the Board applies a liberal, discovery-type standard. *Hamilton Sundstrand,* 352 NLRB 482 (2008), *Disneyland Park*, above. The General Counsel can establish relevance by presenting evidence that either (1) the union demonstrated the relevance of the information, or (2) the relevance of the information should have been apparent to the employer under the circumstances. Ibid. The burden is not "an exceptionally heavy one, requiring only a showing be made of a 'probability that the requested information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.'" *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enfd. 157 F.3d 222 (3d Cir. 1998), quoting *Acme Industrial Co.*, supra at 437.

Since the decision to close the trucking division was made a nonmandatory subject of bargaining by virtue of the management-rights clause in the collective-bargaining agreement, and the Respondent was not obliged to bargain over the closure decision, it logically follows that the Respondent was not legally required to comply with the Union's information request to the extent that it dealt with the decision to close. See *Ingham Regional Medical Center,* 342 NLRB 1259, 1262 (2004); *BC Industries, Inc.,* 307 NLRB 1275, 1275 (1992).

The class-action grievance solely concerned the permanent outsourcing of work and no other matter. Hence, the information requests pertaining to the grievance were essentially interrelated with the decision to close the trucking division and cannot be viewed independently from it. The Respondent did not violate the Act by not bargaining over the decision, and I

therefore conclude that the Respondent was not obligated under Section 8(a)(5) to furnish information related to a grievance filed over that decision.

As previously discussed, the Respondent was required to engage in effects bargaining over the closing of the trucking division and the layoffs of all drivers. It follows that the Respondent was obligated to furnish information pertaining to the effects of the termination of the trucking division and, indeed, has never claimed otherwise.

In this regard, the Respondent was obliged to make a reasonable effort to secure the requested information and, if unavailable, explain or document the reasons for the asserted unavailability. *Goodyear Atomic Corp.,* 266 NLRB 890, 896 (1983); see also *Garcia Trucking Service,* 342 NLRB 764, 764 fn. 1 (2004). The Respondent did not do so for the particular information that it failed to provide. Moreover, if the Respondent did not have available lists with the information requested, this did not excuse its noncompliance. When an employer possesses the requested information but not in the form requested, "it must make some effort to 'inform' the union so that the union may, if necessary, modify its request accordingly." *Yeshiva University,* 315 NLRB 1245, 1248 (1994); *Postal Service,* 276 NLRB 1282 (1985). The Respondent never did such. Therefore, its failure to comply with the requests for certain lists was unlawful. I note that a limited number of employees was involved and that compilation of such lists would not appear to have imposed an onerous burden on the Respondent. Indeed, the Respondent has never claimed this.

In short, the Respondent violated Section 8(a)(5) by failing to furnish information that the Union requested concerning holiday pay, bereavement leave, sick leave, jury duty, accrued vacation benefits, leaves of absence, unpaid compensation, workers' compensation, and unpaid life insurance claims, because such information was presumptively relevant, both as to the effects of the termination of the trucking division and as to the Union's continued role as the collective-bargaining representative of the remaining unit employees.

Based on this determination, I also conclude that the Respondent's failure to provide the Union with such requested information deprived the Union of the ability to meaningfully bargain over the effects of the decision. Hence, I further conclude that the Respondent failed in its obligation to bargain over the effects, even if it made offers to so bargain. See *Comar, Inc.,* 339 NLRB 903, 913 (2003) (*Comar I*), enfd. 111 Fed.Appx 1 (D.C. Cir. 2004); *Miami Rivet of Puerto Rico, Inc.,* 318 NLRB 769, 771–772 (1995).

In sum, I conclude that the Respondent violated Section 8(a)(5) and (1) by failing to furnish the Union with requested information that was relevant and necessary to the Union's role as collective-bargaining representative, and as a result also violated Section 8(a)(5) and (1) by failing to bargain over the effects of the closing of the trucking division.

Turn-To and CSI as Single Employer/Alto Egos

Single employer and alter ego are related but separate concepts. *NYP Acquisition Corp.,* 332 NLRB 1041, 1046 fn. 1 (2000); *Johnston Corp.,* 322 NLRB 818, 818 (1997).

A single-employer analysis is appropriate only where two ongoing businesses are coordinated by a common master. *Cadillac Asphalt Paving Co.,* 349 NLRB 6, 8 (2007). In determining whether two nominally separate employing entities constitute a single employer, the Board examines four factors: (1) common ownership, (2) common management, (3) functional interrelationship of operations, and (4) common control of labor relations. No single factor is controlling, and all not need to be present. Rather, single-employer status depends on all of the circumstances and ultimately is based on the absence of an arm's-length relationship between seemingly independent companies. *Bolivar-Tees, Inc.,* 349 NRB 720 (2007), enfd. 551 F.3d 722 (8th Cir. 2008); *Mercy Hospital of Buffalo,* 336 NLRB 1282, 1283–1284 (2001). The most important single factor is whether there is centralized control over labor relations. *Mercy Hospital,* id. at 1284; *AG Communications Systems Corp.,* 350 NLRB 168, 169 (2007). Common ownership, while significant, is not determinative in the absence of centralized control over labor relations. *AG Communications Systems,* ibid; *Mercy Hospital of Buffalo,* supra at 1284.

When assessing the first prong, the Board considers 1) the degree to which the corporate legal formalities have been maintained, and 2) the degree to which individual and corporate funds, other assets, and affairs have been commingled. *White Oak Coal,* 318 NLRB 732, 735 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996).

Here, I find that the facts establish that Pavlish and Pat Pavlish share common ownership of CSI and Turn-To. Significant in this regard are the following. Turn-To stores vehicles at CSI's facility—in the absence of any formal agreement between CSI and Turn-To, or payment of rent; Brown, Turn-To's driver sometimes leaves his vehicle at the CSI facility, again without there being any kind of formal agreement between CSI and Turn-To; Turn-To leases office space from a business enterprise of which Pavlish is half-owner; and Pat Pavlish continues to be CSI's secretary-treasurer and to receive a salary by virtue of holding that position.

As to functional interrelationship of operations, Brown and the CSI contract drivers have very limited, if any, interaction on a regular basis; the only person connected with CSI with whom Brown interfaces is Pat Pavlish; Brown performs longer-distance driving over a larger geographic area than the CSI contract drivers; a major aspect of Turn-To's business is the leasing of vehicles to CETCO, a function that CSI has never performed; Pat Pavlish operates out of a separate Turn-To office and has no office or desk at CSI; and nothing in the record suggests that she has any interaction with CSI contract drivers or CSI employees or plays any role in CSI's personnel policies or practices. Accordingly, I do not find a functional interrelationship of operations between CSI and Turn-To.

There is no evidence that Pavlish plays any role in the management of Turn-To or that anyone other than Pat Pavlish controls Turn-To's labor relations. CETCO and other contractors have supervisory authority over their contract drivers at CSI and play no role in supervising Brown.

Considering all of the above circumstances, I conclude that Turn-To and CSI do not constitute a single employer.

Turning to the alter-ego issue, the Board generally will find an alter-ego relationship when two entities have substantially identical management, business purposes, operations, equipment, customers, supervision, and ownership. *McCarthy Construction Co.,* 355 NLRB 50, 51 (2010). Not all of these indicia need to be present, and no one of them is a prerequisite to finding an alter-ego relationship. Ibid; *Diverse Steel, Inc.,* 349 NLRB 946, 946 (2007). Unlawful motivation is not a necessary element of an alter-ego finding, but the Board does consider whether the purpose behind the creation of the suspected alter ego was to evade responsibilities under the Act. Ibid; *Diverse Steel, Inc.,* above. See also *Midwest Precision Heating & Cooling, Inc.,* 341 NLRB 435, 439 (2004), enfd. 408 F.3d 450 (8th Cir. 2005). The determination of alter ego ultimately depends on all of the facts in a particular case. *Crawford Door Sales Co.,* 226 NLRB 1144, 1144 (1976).

I note that the Board has not hesitated to find alter ego status when the owners were different but in a close familial relationship. *ADF, Inc.,* 355 NLRB 81, 84 (2010); *Fallon-Williams, Inc.,* 336 NLRB 602 (2001).

Pat Pavlish manages Turn-To and has no direct management responsibilities at CSI, whereas Pavlish has no management responsibilities over Turn-To. Transporting chemicals is but one facet of CSI's business operations, which include storing of hazardous waste and various other functions separate and distinct from transportation. CSI has never engaged in leasing its vehicles to other companies. In contrast, Turn-To's business is limited to leasing vehicles to CETCO and to transporting chemicals. CETCO and other contractors exercise supervisory authority over their drivers at CSI and none over Brown; Pat Pavlish serves as Brown's supervisor and plays no supervisory role over contract drivers at CSI. As discussed above under single employer, I find that the ownership of the two companies is substantially identical.

The final issue as far as alter ego is whether Turn-To was formed to evade CSI's responsibilities under the Act. I have determined that Pavlish's decision to terminate the trucking operation was based on economic considerations rather than motivated by antiunion animus. I also note that Turn-To was not incorporated until well after CSI had already started phasing in the contract drivers to perform unit work on a regular basis. In these circumstances, I cannot conclude that Pavlish created Turn-To as part of a scheme to get rid of the drivers because they were represented by a union. Rather, I conclude that this represented another effort to maximize the profitability of the Pavlishs' business operations.

Based on the above, I conclude that CSI and Turn-To are not alter egos.

Therefore, I recommend that the allegation of single employer/alter egos be dismissed.

Alleged Unilateral Changes

Section 8(a)(5) and (d) of the Act obligate an employer to bargain with the representative of its employees in good faith with respect to "wages, hours, and other terms and conditions of employment." *Fibreboard Corp. v. NLRB,* 379 U.S. 203 (1964); *NLRB v. Borg-Warner Corp.,* 356 U.S. 342, 349 (1958).

Section 8(a)(5) further requires an employer to notify a union and give it an opportunity to bargain over proposed changes in wages, hours, and conditions of employment, before implementing them. *NLRB v. Katz,* 369 U.S. 736, 743 (1962); *Pan American Grain Co.,* 351 NLRB 1412, 1413 (2007). The notice of a proposed change in conditions of employment must be sufficiently in advance of actual implementation to allow a reasonable opportunity to bargain. *NLRB v. Centra, Inc.,* 954 F.2d 366, 372 (6th Cir. 1992); *Giba-Greigy Pharmaceutical Division,* 264 NLRB 1013 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983).

I. HEALTH INSURANCE BENEFITS

Health insurance benefits clearly constitute a term and condition of employment and a mandatory subject of bargaining, and an employer is obliged to afford a union prior notice and an opportunity to bargain over changes in health insurance plans that result in employees paying higher costs for benefits. *Mid-Continent Concrete,* 336 NLRB 258, 259 (2001), enfd. sub nom. 308 F.3d 859 (8th Cir. 2002).

The sufficiency of notice must be examined in the context of when the employer made the decision to propose a change or had a reasonable expectation that it would do so. Here, the Respondent knew by March 15, 2010 that Kaiser was going to substantially raise costs as of August 1, 2010, for the health insurance benefits that were in effect. Yet, the Respondent did not notify the Union of this until July 14, 2010. The Respondent offered no explanation of why it waited 4 months—and only 2 weeks before expiration of the current health plan—to notify the Union and ask for its assistance in obtaining an alternative plan that would be of least detriment to employees. In these circumstances, I conclude that the Respondent's notice to the Union was inadequate and that it therefore failed in its obligation to give the Union sufficient notice and an opportunity to meaningfully bargain before implementing changes in health insurance benefits. Cf. *Woodland Clinic,* 331 NLRB 735, 737 (2000); *Bundy Corp.,* 292 NLRB 671, 672 (1989) (delay in furnishing relevant information absent persuasive explanation is unlawful).

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing health insurance benefits without affording the Union adequate prior notice and an opportunity to bargain.

II. INSTALLATION AND OPERATION OF ADDITIONAL SURVEILLANCE CAMERAS

Installation and operation of additional surveillance cameras is not alleged here as violating Section 8(a)(1) by constituting surveillance of employees' union or protected activities. If it was, the Respondent correctly cites (Br. 81–82) *Trailmobile Trailer, LLC,* 343 NLRB 95, 96 (2004), for the proposition that the test is whether such conduct created "a reasonable tendency to interfere with protected activity under the circumstances." However, precedent going to surveillance is inapposite in deciding the allegation that the Respondent's installation of the camera constituted an unlawful unilateral change.

Installation and use of hidden surveillance cameras in the workplace is a mandatory subject of bargaining, over which a

union has the statutory right to bargain. *Anheuser-Busch, Inc.,* 342 NLRB 560, 560 (2004); *Colgate-Palmolive Co.,* 323 NLRB 515, 515 (1997) (installation of hidden cameras was not an extension of past practice since prior cameras were visible). In *Colgate-Palmolive,* the Board held that "installation of surveillance cameras is both germane to the working environment and outside the scope of managerial decisions lying at the core of entrepreneurial control." Ibid; see also *National Steel Corp.,* 335 NLRB 747, 747 (2001).

The Respondent (Br. 83) argues that the situation presented here is distinguishable from that in *Colgate-Palmolive*: the new surveillance cameras were openly visible and focused strictly on access points in the plant, not the "working environment," and they were required to be in compliance with DHS regulations.

I find the Respondent's position unpersuasive. It is difficult to accept the proposition that cameras clearly visible to employees are of less concern to employees than hidden ones or would have less potential impact on their working environment. Indeed, the contrary could be argued. The placement of at least some of the cameras resulted in their viewing areas of the facility regularly used by employees. I do not dispute the Respondent's contention that the new cameras comported with DHS' suggested security measures. However, the Respondent has not shown that DHS required the particular number of new cameras or their particular locations. Those matters aside, other issues also could have been raised or discussed during bargaining, such as the size of the cameras or how their purpose could be best communicated to employees. I cannot, therefore, accept the Respondent's summary conclusion that "[b]argaining would have been futile and unproductive" (ibid).

Accordingly, I conclude that the Respondent violated Section 8(a)(5) and (1) by unilaterally installing new surveillance cameras without affording the Union prior notice and an opportunity to bargain.

III. DISCIPLINARY POLICY REGARDING DRIVERS' USE OF CELL PHONES AND TRUCK INSPECTIONS

The only document of record regarding cell phone policy is the September 2 memorandum stating that the Company did not want drivers texting, talking, or making personal calls while driving, and further stating that if drivers needed to make or answer a call, they needed to pull off the roadway at a safe place or do so at designated stops. As noted, determining the policy before that memo is problematic because Griffin was the sole witness to testify thereon, and his testimony was confusing. Some of his testimony supports the conclusion that the memorandum was merely a restatement of existing policy but, regardless, I cannot find that the memorandum changed the policy. No grievance or ULP charge was filed over its issuance.

Because Schill essentially reiterated the policy as set out in the September 2 memorandum, I conclude that the Respondent made no unilateral change in the cell phone policy during the October training sessions with Griffith, Zemaitis, and other drivers.

In contrast to the cell phone policy, the Respondent did not have in October 2010 a written policy on time limits for preinspections. The change announced at the training sessions was that drivers would have to report to management if they went over 30 minutes, or they would face discipline. Thus, they were not told that they would be disciplined for taking more than 30 minutes but only that they would now have to report it.

The Respondent's pretrip inspection policies directly involved drivers' terms and conditions of employment and were therefore a mandatory subject of bargaining. However, as the Board stated in *Crittenton Hospital,* 342 NLRB 686, 686 (2004), "[N]ot all unilateral changes in bargaining unit employees' terms and conditions of employment constitute unfair labor practices. The imposed change must be a 'material, substantial, and significant' one . . . ." See also *Berkshire Nursing Home, LLC,* 345 NLRB 220, 220 (2005).

In a case involving an analogous issue to that posed here, *El Paso Electric Co.,* 355 NLRB 544 (2010), a change requiring employees to call in to advise that they were going to be unable to finish a job was held not to rise to the level of material, substantial, and significant.

Similarly, I find that the Respondent's requiring drivers to notify management when they needed to take or had taken over 30 minutes for a pretrip inspection did not result in a heavy burden on drivers or amount to a material, substantial, and significant change. I emphasize that the change was merely one of notification, not of a change in disciplinary policies.

Therefore, I recommend dismissal of the allegations that the Respondent violated Section 8(a)(5) and (1) by making unilateral changes in cell phone and pretrip inspection policies in October 2010.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By issuing a verbal warning to Bill Zemaitis, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

4. By making unilateral changes in health insurance benefits and installation of surveillance cameras, failing to timely provide the Union with information it requested concerning the effects of the decision to close the trucking division and pertaining to the remaining unit employees, and failing and refusing to engage in bargaining over the effects of the decision to close the trucking division, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(5) and (1) of the Act.

5. By threatening employees with unspecified reprisals, discharge, or other discipline because of their union/protected activity, including the filing of grievances under the collective-bargaining agreement, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including the following.

Since the Respondent discriminated against Bill Zemaitis by issuing him a verbal warning on November 11, 2010, the Respondent shall expunge from its records any reference to the warning and notify him in writing that such action has been taken and that any evidence related to that warning will not be used against him in any way. See *Sterling Sugars, Inc.,* 261 NLRB 472, 472 (1982).

Regarding the unilateral change in health insurance benefits, the Respondent shall restore the status quo ante and reimburse unit employees for any expenses that resulted. See *Larry Geweke Ford,* 344 NLRB 628, 628 (2005); *Keeler Die Cast,* 327 NLRB 585, 590–591 (1999). The make-whole remedy shall be computed in accordance with *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011), with an applicable rate of interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I note that the Respondent may choose to litigate in compliance whether it would be unduly burdensome to restore the status quo ante with respect to the unilateral changes in health insurance benefits in effect prior to September 1, 2010. See *Comau, Inc.,* 356 NLRB No. 21, slip op. at 1 fn. 7 (2010); *Geweke Ford,* supra at 629.

With respect to unilateral installation of new surveillance cameras, the Acting General Counsel has not contended that that they resulted in unlawful surveillance and has never explicitly requested a remedy of restoration of the status quo ante. No evidence was introduced to show that any employees have been disciplined or otherwise adversely affected by the Respondent's conduct, and requiring the Respondent to go to the expense of removing the new cameras and potentially jeopardizing its legitimate security concerns strikes me as unnecessary and potentially contrary to other Federal Government policies, in particular, those policed by the DHS. A remedy providing that the Respondent meet and bargain with the Union with respect to the installation and use of the surveillance cameras is sufficient and appropriate. See *Colgate-Palmolive Co.,* supra at 516.

The Acting General Counsel does not seek a broad cease-and-desist order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[78]

[78] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Chemical Solvents, Inc., Cleveland, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with unspecified reprisals, discharge, or any other discipline as retaliation for their union/protected activity, including the filing of grievances.

(b) Verbally warning or otherwise discriminating against any employees for engaging in activities on behalf of the Teamsters Local Union 507 a/w International Brotherhood of Teamsters (the Union) including the filing of grievances under the collective-bargaining agreement.

(c) Making changes in health insurance benefits, installation of surveillance cameras, or any other term and condition of employment without affording the Union adequate prior notice and an opportunity to bargain.

(d) Failing to timely provide the Union with information it requests that is relevant and necessary for it to fulfill its role as a collective-bargaining representative, including bargaining over the effects of the Respondent's decision to terminate the trucking division, and its representation of remaining unit employees.

(e) Failing to bargain with the Union over the effects of the decision to terminate the trucking division.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful verbal warning issued to Bill Zemaitis, and within 3 days thereafter notify him in writing that this has been done and that the discipline will not be used against him in any way.

(b) On the Union's request, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on September 1, 2010, and maintain those terms until the Union agrees to the changes or the parties bargain to a new collective-bargaining provision or reach an overall valid impasse.

(c) Make employees whole by reimbursing them, in the manner set forth in the remedy section of the decision, for any loss of benefits and additional expenses they incurred as a result of the unilateral changes in health insurance benefits that were implemented on September 1, 2010.

(d) On the Union's request, bargain over the installation and operation of new surveillance cameras in August and September 2010.

(e) Provide the Union with information that it requested on about January 19, 2011, which was relevant and necessary for it to bargain over the effects of the Respondent's decision to terminate the trucking division, and to represent remaining unit employees.

(f) Bargain with the Union over the effects on employees of the termination of the trucking division and the layoffs of unit drivers.

(g) Within 14 days after service by the Region, post at its facilities in Cleveland, Ohio, copies of the attached notice marked "Appendix."[79] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices should be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2010.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 15, 2012

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

We recognize Teamsters Local Union 507 a/w International Brotherhood of Teamsters (the Union) as the collective-bargaining representative of a unit composed of all full-time and regular-part time production and maintenance employees and truckdrivers (drivers).

WE WILL NOT threaten you with unspecified reprisals, discharge, or any other discipline because you engage in activity on behalf of the Union or in other protected activity, including the filing of grievances under the collective-bargaining agreement.

WE WILL NOT issue you verbal warnings or other discipline because you engage in activity on behalf of the Union or in other protected activity, including the filing of grievances.

WE WILL NOT make changes in health insurance benefits, installation of surveillance cameras, or any other term and condition of employment without affording the Union adequate prior notice and an opportunity to bargain.

WE WILL NOT fail to provide the Union with information it requests that is relevant and necessary for it to fulfill its role as a collective-bargaining representative, including bargaining over the effects of our decision to terminate the trucking division and lay off drivers, and its representing remaining unit employees.

WE WILL NOT fail to bargain with the Union over the effects of our decision to terminate the trucking division and lay off drivers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful verbal warning issued to Bill Zemaitis, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, on the Union's request, restore the health insurance benefits that existed prior to the unilateral changes that were implemented on September 1, 2010, and maintain those terms until the Union agrees to the changes or the parties bargain to a new collective-bargaining provision or reach an overall valid impasse.

WE WILL make you whole for any loss of benefits and additional expenses you incurred as a result of the unilateral changes in health insurance benefits that were implemented on September 1, 2010.

WE WILL, on the Union's request, bargain over our installation and operation of new surveillance cameras in August and September 2010.

WE WILL provide the Union with information that it requested on about January 19, 2011, which was relevant and necessary for it to bargain over the effects of our decision to terminate the trucking division and lay off drivers, and to represent remaining unit employees.

WE WILL bargain with the Union over the effects on employees of the termination of the trucking division and the layoffs of drivers.

CHEMICAL SOLVENTS, INC.

[79] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."